IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

21 August 2024

CASE No: AIFC-C/CFI/2024/0012

«ELEKTROMETAL SPÓŁKA AKCYJNA» Joint-Stock Company

Claimant

v

«QARMET» Joint-Stock Company

Defendant

ORDER

Justice of the Court:

Justice Tom Montagu-Smith KC

ORDER

UPON the Claimant filing a “Letter” requesting the termination, and by agreement between the parties,

IT IS ORDERED THAT the claim be discontinued.

By the Court,

Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Omar Shuremov, Lawyer, “MG Partners Karaganda” LLP, Karaganda, Republic of Kazakhstan.

The Defendant was represented by Mr. Rustem Nurgaliyev, Senior Lawyer, Qarmet JSC, Republic of Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 June 2024

CASE No: AIFC-C/CFI/2024/0011

Mr. Damir Mukashev

Claimant

v

«OPTOGRAD» LLP

Defendant

Kairat Berdenov

Defendant

Almat Berdenov

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 22 May 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph IV of the Clarification of the IAC Arbitration Award dated 8 April 2024 made by Ms. Snezhana Kutsenko, the sole arbitrator appointed by a letter dated 14 November 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 35/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

> Based on the above, in accordance with Art. 26, Art. 27 of the IAC Rules, Art. 9 of the Civil Code of the Republic of Kazakhstan, the Arbitral Tribunal allowed to fix the dispute settlement between Mr. Damir Mukashev IIN 750420301403 to "OPTOGRAD" LLP BIN: 120540013063, Mr. Kairat Berdenov IIN: 880530301913, Mr. Almat Berdenov IIN 810621300124 on the agreed terms.
> In case of non-fulfilment of the agreed terms by the Respondents, to collect jointly from "OPTOGRAD" LLP BIN: 120540013063, Mr. Kairat Berdenov IIN: 880530301913, Mr. Almat Berdenov IIN 810621300124 in favour of Mr. Damir Mukashev the amount of debt in the amount of 24,168,711 KZT minus the paid amounts at the time of application to the AIFC Court for issuance of an order to enforce the terms of the settlement agreement.
> At the time of application to the AIFC Court the amount of debt to Mukashev Damir Maksatovich is 14,168,711 (fourteen million one hundred sixty-eight thousand seven hundred and eleven) KZT.
> The Respondents shall pay 14,168,711 (fourteen million one hundred sixty-eight thousand seven hundred and eleven) KZT to the Claimant.

3. The Defendants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendants within that period has been finally disposed of, whichever is the later.

By the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Daniyar Niyazgulov, Director, Benefits & Partners law firm, Astana, Kazakhstan.

The Defendants were not represented.

IN THE SMALL CLAIMS COURT OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 March 2022

CASE No: AIFC-C/SCC/2021/010

ARMAN KUATOV

Claimant

v

PRIVATE COMPANY SERGEK DEVELOPMENT LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Patricia Edwards

ORDER

UPON the commencement of a Claim on 8 November 2021;

AND UPON the filing of a Defence on 22 November 2021;

AND UPON the Court making orders on 20 December 2021 and 3 February 2022;

IT IS ORDERED that:

1. The claim is dismissed in full.

2. No order as to costs.

JUDGMENT

1. On 12 June 2020, the parties signed an Employment Agreement. The agreement was initially for one year of work, commencing on 12 June 2020 (clause 2). Additional Agreement No 1 dated 27 November 2020 reduced the claimant's salary to 200,000 tenge a month from 1 December 2020.

2. By a letter dated 21 April 2021, the claimant asked for unpaid leave to care for a child, from 21 April to 30 December 2021. According to the claim, the claimant made several further requests thereafter, but I have not seen these. The child in question was born on 30 December 2018. (The claimant has since become father to a second child, born on 20 November 2021.)

3. In a letter dated 21 June 2021, the defendant responded "*In accordance with subparagraph 2) of paragraph 6.3 of the Employment Agreement, the Company refuses to give you an unpaid leave to take care of a child until the child reaches the age of three years*".

4. In a further letter dated 8 July 2021, the defendant wrote "*you need to go to work full-time from July 12, 2021*".

5. By a letter dated 23 July 2021, the claimant wrote "*After your refusal to let me to take an unpaid leave to care for a child until the child reaches the age of three, I ask you to terminate the employment contract with me on my initiative on July 23, 2021, the last working day is July 23, 2021*".

6. In a further letter dated Monday 4 October 2021, the claimant said "*after more than 2 months, my application remains not considered, and to date I have not received any response*" and asked for his application to be considered.

7. By a letter dated 12 October 2021, the defendant responded:

> *"Considering that you are absent from work for a long time without a valid reason (there are relevant acts) and ignore the employer without giving feedback, notifications of going to work were repeatedly sent to your place of residence, which were also ignored by you.*
>
> *Your actions on unauthorised dismissal, that is, unauthorised leaving the place of work before the expiration of the established periods after the warning about termination of the employment contract on your own initiative, is also a violation of the Labor Law.*

In this regard, in order to resolve the issue of terminating the labor agreement for positive reasons, you need to come to work and give explanations to the employer about the situation.

Otherwise, the contract will be terminated on the initiative of the employer for negative reasons in accordance with labor law."

8. The claimant did not speak to the defendant as requested. Instead he filed this claim on 8 November 2021. The defendant filed a defence on 22 November 2021. I subsequently made orders permitting further information, documents and witness statements to be filed. The claimant filed further submissions and documents on 18 January 2022. As these were substantial, I considered it fair to allow the defendant an opportunity to respond, which it did on 11 February 2022. The claimant provided final submissions in response on 18 February 2022.

9. The defendant indicated that it would prefer a hearing with its legal representative. The claimant disagreed and said that he would have no representation and would be disadvantaged by a hearing. I consider that the parties have had considerable time to file any submissions and evidence relied upon and it is most appropriate now to proceed to judgment without a hearing.

Issue 1: Was the claimant entitled to unpaid leave?

a. Clause 6.3

10. Clause 6.3 provides:

"6.3 Maternity leave for men

1) The Employee who gives birth to a child and shall be entitled to paid leave of at least 5

working days' duration; this leave shall be paid as normal working days;

2) The Employee who has adopted a child under 3 months old shall be entitled to maternity leave in connection with adoption and shall be entitled to paid maternity leave according to the AIFC Regulations;

The childcare leave may be taken within 2 months from the child's birth;

The childcare leave shall be paid as normal working days;

The Employee may not receive compensation in lieu of leave".

11. The claimant contends, firstly, that clause 6.3 is not applicable at all because of errors of drafting or translation.

12. First, the claimant refers to the title of the sub-clause, "*maternity leave for men*", rather than calling it 'paternity' leave, and the fact it applies to an employee "*who gives birth to a child*", which men cannot do. However, it seems to me sufficiently clear that clause 6.3(1) intends to address leave for men whose child is born (while clause 6.2 provides for "*Maternity leave for women*"). The claimant's interpretation would leave the clause with no purpose at all. As set out in the AIFC Contract Regulations, Regulation 53, "*Contract terms must be interpreted to give effect to all the terms rather than to deprive some of them of effect*".

13. In the alternative, the claimant contends that the part of clause 6.3 relied on by the defendant is not applicable to him.

14. The claimant's case is that the two month limitation applies only in the case of an adopted child. I am unable to accept that argument. It seems to me that the final three paragraphs of clause 6.3 were intended to apply to both subparagraphs (1) and (2) of the clause. All three limitations are readily applicable to both subparagraphs.

15. The first limitation requires leave to be taken "*within 2 months from the child's birth*". As the clause applies to adoption up to 3 months old, on the face of it this limitation applies more squarely to 6.3(1). It might properly be said to mean within two months of the child's birth *or adoption*. In any event, were the two month limitation not applicable to subparagraph (1), then there would be no apparent time limit at all on when the leave could be taken, in stark contrast to the short time limit in the case of adoption.

16. It is true that the second limitation, that the leave is to be paid as normal working days, duplicates the same proviso in subparagraph (1). But that appears to be no more than an inelegance of drafting.

17. Furthermore, the AIFC Employment Regulations includes the following provisions:

> "***39. Paternity leave and pay***
>
> *(1) An Employee who becomes a father to a newly-born child is entitled to paternity leave for a minimum period of 5 Business Days or, if the Employee is entitled to paternity leave for a longer period under the Employee's Contract of Employment, for that longer period.*

(2) The paternity leave must be taken within 2 months after the day of the child's birth.

(3) During the minimum period of paternity leave under subsection (1), the Employer must pay the Employee at the Employee's normal Daily Wage.

(4) The Employee cannot receive compensation in lieu of paternity leave."

18. The provisions of the contract mirror these provisions closely, which further suggests that they were each intended to apply in all cases, not just in the case of adoption.

19. The claimant also notes that sub-paragraph (1) appears in one box of the contract, while subparagraph (2) appears in a separate box together with the final sentences of Article 6.3. However, looking at other provisions of the contract, they are not always divided perfectly into such boxes (e.g. clauses 1.3 and 4.3), and to rely on these as changing the interpretation of the provisions would seem to me to attach undue significance to this feature of the drafting.

20. Accordingly, in my judgment, the claimant was not entitled to paternity leave under these provisions.

b. Article 100

21. The claimant argues that Article 100 of the Labour Code of the Republic of Kazakhstan is "*of a superior legal power over clauses of Employment Agreement*". Article 100 provides:

> *"**Article 100. Unpaid leave for child care until he reaches the age of three***
>
> *1. The employer is obliged to grant an unpaid leave to the worker for childcare until he reaches the age of three:*
>
> *1) at the choice of the parents - the mother or the father of the child;*
>
> *[…]*
>
> *2. An unpaid leave for child care until the age of three is granted on the basis of a written application of the employee with indication of its duration and provision of a birth certificate or other document confirming the birth of the child.*
>
> *The employee can use the leave to take care of the child until he reaches the age of three years in full or in parts. […]"*

22. Article 8 is entitled "Scope of this Code" and includes the following:

"2. This Code applies to employees, employees of the sending party, employers, as well as the receiving party, which are located on the territory of the Republic of Kazakhstan … unless otherwise provided by the laws of the Republic Kazakhstan …

…

4. Laws of the Republic of Kazakhstan shall not reduce the level of rights, freedoms and guarantees established by this Code."

23. The claimant relies on Regulation 3 of the AIFC Employment Regulations, which states that the Regulations "*provide minimum employment standards for Employees who are based in, or ordinarily work in or from, the AIFC*".

24. As set out above, Regulation 39 provides that a new father "*is entitled to paternity leave for a minimum period of 5 Business Days or, if the Employee is entitled to paternity leave for a longer period under the Employee's Contract of Employment, for that longer period*".

25. The claimant further relies on Article 4(1)(3) of the AIFC Constitutional Statute:

"***Article 4. Acting Law of the AIFC***

1. The Acting Law of the AIFC is based on the Constitution of the Republic of Kazakhstan and consists of: …

1) this Constitutional Statute; and

2) AIFC Acts, which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute; and

3) the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts".

26. It can be seen from this that the Labor Code of Kazakhstan applies to matters "*not governed*" by the AIFC Acts. However, paternity leave is governed by the AIFC Employment Regulations.[1] There is therefore no scope for the application of Article 100. The claimant was not entitled to paternity leave on this basis either.

[1] Article 1(4) provides that "*AIFC Act means an official written document, adopted by an AIFC Body, relating to the relationships between AIFC Participants, AIFC Bodies, their Employees, AIFC Participants and AIFC Bodies, AIFC Participants and their Employees or Employees of AIFC Bodies, AIFC Bodies and their Employees or Employees of AIFC Participants*". Accordingly, the AIFC Employment Regulations are an AIFC Act.

Issue 2: Was the defendant obliged to pay the claimant's salary?

27. The claimant wrote to the defendant on 21 April 2021 asking for paternity leave to start the very same day. It appears to be common ground between the parties that the claimant has done no work since then. The last payment of salary was made on 5 May 2021.

28. The claimant is correct that the contract provides for salary to be paid in full and on time (clauses 4.1(8), 4.4(6), 5.2). Regulation 20 of the AIFC Employment Regulations provides that deductions from wages may only be made in limited circumstances, including if authorised "*under legislation that applies in the Astana International Financial Centre or under the Employee's Contract of Employment*".

29. However, the obligation to pay salary is contingent on an employee working. The principle is sometimes expressed as one of "*no work, no pay*". This can be seen, for instance, in the decision of the House of Lords in Miles v Wakefield [1987] IRLR 193.[2] The claimant stopped working after expressing his desire to take paternity leave, to which he was not in fact entitled. The defendant was therefore entitled to stop paying his salary for so long as the claimant remained unwilling to work.

30. The same result can also be reached by looking at Regulation 79 of the AIFC Contract Regulations:

> *"79. Withholding performance*
>
> *(1) If the parties are to perform simultaneously, either party may withhold performance until the other party tenders performance.*
>
> *(2) If the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed."*

31. Payment of salary followed work by the claimant. The claimant did not work and therefore the defendant was not obliged to pay.

[2] Pursuant to Article 13(6) of the AIFC Constitutional Statute, final judgments of the courts of other common law jurisdictions may be taken into account in this court.

Issue 3: Disputes in relation to the workplace

32. The pleadings raise various issues as to whether the claimant was required to work in an office, whether a suitable workplace was provided for the claimant, and whether the defendant requested the claimant to go to the office contrary to one or more Resolutions of the Chief State Sanitary Doctor of the City of Nur-Sultan.

33. Clause 1.3 of the contract provides "*The place of execution of work under this Agreement: NurSultan city*". The claimant says he did not attend an office for his entire period of work, from June 2020, and was never disciplined for this. He says the first time the defendant raised the issue was in July 2021. The defendant has not disputed that the claimant never worked from an office, nor provided any details of where else the claimant should have worked.

34. The defendant's letter of 8 July 2021 said "*you need to go to work full-time from July 12, 2021*". It is not clear from this short letter that this was actually a requirement to work from a particular location, rather than simply a request for the claimant to resume working as he had been doing.

35. The defendant's letter of 12 October 2021 asked the claimant to come to work to explain the situation in order the resolve the issue of terminating the contract, as requested by the claimant. The defendant has said in these proceedings that the claimant was asked to attend the office for his proper dismissal and "*to transfer projects under his management, documentation and materials on work projects to colleagues, as well as transfer of inventory items, if any*". This echoes clause 4.2(16), which provides that in the case of any termination, whatever the reason, the claimant must transfer to the defendant documents, files, passwords and equipment, at least 3 working days prior to the date of termination. In the event, the claimant did not discuss termination further with the defendant following that letter.

36. In the circumstances, I am unable to conclude that the claimant was required to work in any particular office or that he violated any requirement to do so. Equally, the claimant seems content for the defendant not to have provided a physical place of work. The parties appear to have proceeded from the outset of the contract on the basis that the claimant would work from home

and did so. Neither party has established any actionable breach of contract in relation to these workplace issues.

Issue 4: Termination

37. The claimant seeks an order requiring the defendant to terminate the agreement.

38. The duration of the contract is addressed in clause 2:

> *"2.1 The Agreement is concluded for 1 year.*
>
> *2.2 The date of commencement of work: June 12, 2020.*
>
> *2.3 Upon expiry of the Agreement, the Parties shall be entitled to extend it for an indefinite or fixed term of at least one year. In case of expiration of the term of the labor agreement, if*
>
> *neither party has notified in writing about the termination of the employment relations during the last working day (shift), the Agreement is considered to be extended for the same period as it was previously concluded, except for the cases provided by the AIFC Regulations, the Code of Ethics."*

39. As neither party sent a notification of termination before the end of the first year, on 12 June 2021 the agreement was automatically extended for a further year.

40. The contract might terminate before that period expires if either party chooses to terminate following a material breach by the other. That has not happened.

41. The first mention of termination was in the claimant's short letter of 23 July 2021, which said "*I ask you to terminate the employment contract with me on my initiative on July 23, 2021, the last working day is July 23, 2021*". It is not entirely clear on what basis the claimant sought to terminate. Clause 10.4 provides:

> *"In the event of termination of this Agreement on its own initiative, the Employee shall be obliged to notify the Employer in writing not later than 1 (one) calendar month in advance, and during this period, the Employee shall:*
> *- reimburse losses, if they were caused to the Employer by the Employee, -*
> *pay all kinds of debts to the Employer, - finish the work started".*

42. However, the claimant did not give a month's notice; nor is there any suggestion of doing any of the things listed in the clause.

43. Alternatively, the parties can agree earlier termination. This appears to be what the claimant was contemplating: his letter of 23 July asked the defendant to terminate, and his letter of 4 October asked the defendant again to consider the claimant's application. Termination by agreement is addressed in clause 10.5, which provides that one party may send a notice to the other, who should respond within three working days. Although the defendant did not respond to the claimant's first request, it could have simply declined. The defendant did eventually respond on 12 October, asking the claimant to meet to discuss possible termination. The claimant did not do so, but proceeded to commence this litigation. No agreement to terminate the contract was reached.

44. Accordingly, the employment contract remains in force. Under a contract of employment the parties have mutual obligations to be ready, willing and able to work, and to be ready, willing and able to pay wages. As noted in the context of Issue 2 above, the non-performance of one obligation excuses performance of the other. However, that does not mean that the contract ceases to exist if either is not performed. It simply means that the particular obligation is suspended until the other mutual obligation is performed.

45. I note that an agreed termination does not appear to be beyond contemplation. The defendant's position seems to be that it simply wants to ensure that termination of the contract happens legally and properly, with a complete transfer of projects, documents and materials. Both parties have expressed willingness to terminate the contract; it is to be hoped that they can resolve this between themselves.

Issue 5: Damages

46. As I have found that the defendant was not in breach of contract or obliged to pay the salary, the claimant has no entitlement to recover any damages.

47. It might be noted that, if the defendant had granted paternity leave, then the claimant would in any event have done no work, and earned no money, for the period between April and December 2021. He has suffered no loss of income and would have incurred the same expenditure either way. The claimant's substantial claim is somewhat surprising in circumstances where what he sought, and in fact achieved, was neither to work nor be paid during the remainder of the year.

48. Insofar as the claimant's further submissions make reference to his salary in the months prior to April 2021, this forms no part of the claim filed in this action and there is in any event insufficient

evidence of any issue with the payments. The claimant's suggestion that his 200,000 tenge salary was unfairly imposed is difficult to reconcile with the lack of evidence of any complaint by the claimant, the fact that he signed the Additional Agreement No 1,[3] and the fact that he did not terminate the contract before it renewed in June 2021 – despite his submission in this case that he could have found another job with a salary of 1,500,000 tenge; that is some 7.5 times the amount of the salary agreed in November 2020.

Conclusion

49. For the reasons above, the claim falls to be dismissed in full. The defendant is not obliged to terminate the contract of employment nor to pay any damages to the claimant. Pursuant to Rule 26.9, I do not consider it appropriate to make any order as to costs.

By the AIFC Small Claims Court,

Patricia Edwards,
Justice, AIFC Small Claims Court

Representation:

The Claimant was not represented

The Defendant was represented by:

[3] The claimant refers to Article 46 of the Labor Code of Kazakhstan to say that the defendant should have given 15 days' notice of the change in salary. That provision deals with changes in working conditions and makes no mention of pay. In any event, as noted in the context of Issue 1 above, the Acting Law of the Republic of Kazakhstan applies in part to matters not governed by AIFC Acts. The AIFC Contract Regulations provide in Regulation 10 that a contract "*can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Regulations*". Clauses 10.1 and 12.2 of the contract provide for amendments to be made by a written additional agreement, as happened in this case.

1. Mr. Daniel Muzapbar, Korkem Telecom LLP; 2. Mr. Askar Issayev, Korkem Telecom LLP.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

28 March 2024
CASE No: AIFC-C/CFI/2024/0009

MR. SARINOV AYAN TOLEUOVICH

Appellant

v

(1) KHAN TENGRI CAPITAL LLP
(2) APEX MANAGEMENT GP LTD

Respondents

JUDGMENT

Chief Justice of the Court:

The Rt. Hon. The Lord Burnett of Maldon

JUDGMENT

1. This is an application by the Appellant/Claimant for permission to appeal against the order of Justice Saima Hanif KC of 1 February 2024 in Case No. AIFC – C/SCC/2023/0042. By her order, the judge allowed his claim against the First Respondent/First Defendant (Khan Tengri Capital LLP) for breach of his contract of employment with them. She ordered the termination of the contract from 1 November 2023 and made monetary awards totalling KZT 6,702,415.77. That was made up of wages due from June to October 2023, a penalty due under Article 113.3 of the Labour Code and money due for unused holiday leave. The judge dismissed a claim for damages relating to a bank loan taken out by the Appellant. She also dismissed a claim for moral harm that was described in various ways by the claimant, but was essentially for distress and anguish he said was caused by the Khan Tengri Capital's failure to pay him his contractual wages. This part of his claim was encompassed under the heading 'Seeking Redress for Unimaginable Hardship' in the original claim form described as 'moral distress' in seeking relief.

2. The judge dismissed all the claims against the Second Respondent/Second Defendant (Apex Management GP Ltd), concluding that the Appellant had no contractual relationship with them. His contention was that he had an implied contract of employment with Apex Management concurrently with his employment with Khan Tengri Capital.

3. The Appellant has provided a comprehensive argument in his application form of 14 February 2024. The Respondents responded with a detailed Respondents' Notice on 6 March 2024.

4. Apex Management was a new financial services company which needed regulatory approval. Khan Tengri Capital had a substantial financial interest in Apex Management. The judge accepted that the Appellant's contract of employment with Khan Tengri Capital as an associate encompassed expressly the work he did in connection with the establishment and registration of Apex Managment. She also observed that the Appellant's case, if accepted, would have resulted in his working full-time for two separate employers.

5. The application for permission to appeal must be considered in accordance with Rule 29.6 of the AIFC Court Rules and will be granted where 'the appeal would have a real prospect of success' or 'there is some other compelling reason why the appeal should be heard'. Rule 29.7 identifies that an appeal will be allowed where the decision of the lower court was 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings' below.

6. The overriding contention of the Appellant in support of his application for permission to appeal against the dismissal of his claim against Apex Management is that in rejecting his case that he was an employee of Apex Management, as well as Khan Tengri Capital, the judge 'failed to consider all the facts and evidence' he had presented which amounts to a serious irregularity for the purposes of Rule 29.7(2). He suggests that the judge made 'an incomplete assessment' with the result that there should be a 'reconsideration that takes into account the complexities of modern work arrangements, emphasising the substantive aspects that establish a clear employer-employee relationship.'

7. In seeking compensation for 'Moral Distress' the Appellant suggests that the judge was wrong to consider this part of his claim by reference to the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 7 of 2015 on Moral Harm because it is not part of the Acting Law of the Republic of Kazakhstan for the purposes of Article 4.1(3) of the Constitutional Statute of the AIFC. Instead, he seeks to rely upon the Canadian Law of punitive damages as articulated in

the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co* [2002] 1 SCR 595 at para 36.

8. The judge considered this small claim on the basis of the papers provided to her by the parties. Those papers, which I have reviewed, contained a large volume of emails, screenshots etc., on which the Appellant relied in support of his contention that he was employed implicitly by Apex Management.

9. The argument that the judge failed to take into account all of the evidence with which she was provided is, in my judgment, unsustainable.

10. In setting out the 'salient facts' the judge referred to that large body of material. In para 32 of her judgment, when finding for Apex Management, she referred to 'having regard to the documentary evidence'. In particular, the judge explained that she considered that the documentary materials were consistent with what was envisaged as falling within the scope of the Appellant's employment with Khan Tengri Capital in a critical email of 31 May 2023. The short point was that the contractual arrangement with Khan Tengri Capital envisaged his employment being with them whilst he was closely involved in setting up Apex Management. All the work relating to the activities of Apex Managment was to be carried out by the Appellant under the contract with Khan Tengri Capital read with the email of 31 May.

11. There was no arguable irregularity here nor could it be said that the judge was wrong in her conclusion that the evidence did not support a finding of concurrent employment of the Appellant by Apex Management. The judge was also right to consider the odd consequences of the Appellant's suggestion that he was employed by two separate employers, full-time and concurrently.

12. The Appellant mentioned in his original claim form that there was a witness who could support his claim against Apex Management but no evidence from the witness was provided in the claim. He refers again to the witness's existence in his notice of application for permission to appeal. But an appeal does not provide an opportunity to bring evidence before the court which could have been made available at first instance.

13. The application for leave to appeal against Apex Managment is, in reality, based upon a disagreement with the judge's conclusion on the totality of the evidence rather than any appealable point.

14. I have summarised the way in which the Appellant put his case for damages for Moral Distress. His claim form and the preceding correspondence did not identify the legal basis for such a claim. In their Defence, both Respondents made reference to the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 7 of 2015 on Moral Harm. They explained that this law did not assist the Appellant because it applied only to non-property claims. In his Reply to the Defence, the Appellant argued that 'despite legal distinctions between property and non-property claims, the suffering experienced by the Claimant goes beyond mere monetary loss. [The] breach of contract caused substantial emotional distress...' I do not read that Reply as disputing that his claim did not fall within the scope of 'moral harm' in Kazakh law nor did it advance a different basis upon which such damages could be paid.

15. It is therefore not surprising that the judge failed to make an award. The claim is now put forward on a different basis but also suggests that the Regulatory Resolution of the Supreme Court is not part of the law applicable in the AIFC Court.

16. Article 4 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre provides the Acting Law of the AIFC. It includes 'the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts'. Article 13.6 allows the Court to take account of the final judgments of the courts of other common law jurisdictions and Regulation 29 of the AIFC Court Regulations enables the court to apply 'such law as appears to the Court to be the most appropriate in the facts and circumstances of the dispute' so long as it is not inconsistent with the governing AIFC law.

17. The Appellant now argues that the Regulatory Resolution of the Supreme Court is not part of the Acting Law of Kazakhstan. He refers to the Law of Kazakhstan 'On Legal Acts' No. 480 V dated 6 April 2016, and specifically Article 10 concerning the Hierarchy of Legal Acts. As the Respondents point out in their Respondent's Notice, the Appellant has taken one part of this Law out of context. Articles 4 and 5 make clear that a Regulatory Resolution of the Constitutional Court of the Republic of Kazakhstan or the Supreme Court of the Republic of Kazakhstan is part of Kazakh Law. The judge was fully entitled to consider this part of the claim by reference to the relevant Regulatory Resolution. The Appellant does not suggest that his claim falls within the concept of 'moral harm' as articulated by the Supreme Court of Kazakhstan. I would add that the law of England and Wales, save for extremely limited exceptions, does not allow for the recovery of damages for the distress caused by a breach of contract. Exemplary damages may be awarded in exceptional circumstances. This breach of contract claim is far removed from such a circumstance. The Appellant has referred to Canadian law where the concept of exemplary damages is referred to as punitive damages. Although the approach in Canada is considered to be more flexible than in England, the paragraph in the judgment in *Whiten* to which he refers shows its wholly exceptional nature. Even were it applicable, it would not assist him.

18. There is no merit in this part of the Appellant's application.

19. The Appellant notes that no order for costs was made by the judge. Part of her reasoning appears to rest on an assumption that Khan Tengri Capital would satisfy the judgment by 9 February 2024. He says that has not happened. He therefore asks the Appeal Court to revisit the costs order.

20. This is not an appeal point but rather a matter that needs to be raised with the court below.

21. I am satisfied that the appeal would not have a real prospect of success nor is there some other compelling reason why the appeal should be heard. In the result this application for leave to appeal must be dismissed.

By Order of the Court,

The Rt. Hon. The Lord Burnett of Maldon,
Chief Justice, AIFC Court

Representation:

The Appellant was represented by Mr. Islambek Nurzhanov, independent external lawyer, Astana, Kazakhstan.

The Respondents were jointly represented by Ms. Aidana Tokina, independent Legal Consultant, Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 February 2024

CASE No: AIFC-C/CFI/2024/0008

Damir Mukashev

Claimant

v

(1) "ABN ALYANS" LLP,

(2) Nurlan Rysbekov,

(3) Bazarkul Aidarov

Defendants

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 2 February 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in part 7 of the IAC Arbitration Award dated 17 January 2024 made by Ms. Snezhana Kutsenko, the sole arbitrator appointed by a letter dated 3 October 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 32/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order that the Claimant is entitled:

    1) To collect from "ABN ALYANS" LLP BIN 190340018634, Nurlan Rysbekov IIN 670520350498, Bazarkul Aidarov IIN 700118301797 in solidarity in favor of Damir Mukashev IIN 750420301403 the amount of debt 51,945,641 (fifty-one million nine hundred forty-five thousand six hundred forty-one) tenge, the amount of a lump sum penalty for late payment in the amount of 5% of the loan amount under all agreements and amounts to 1,035,000 (one million thirty-five thousand) tenge, expenses for payment of representative's services in the amount of 675,000 (six hundred seventy-five thousand) tenge, expenses for payment of the arbitrator's fee in the amount of 300,000 (three hundred thousand) tenge.

3. The Defendants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Daniyar Niyazgulov, Director of Benefits & Partners law firm, Astana, Republic of Kazakhstan.

The Defendants were not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 February 2024

CASE No: AIFC-C/CFI/2024/0007

LIMITED LIABILITY PARTNERSHIP «POLYMETTECH»

Claimant

v

LIMITED LIABILITY PARTNERSHIP «BALKHASHPOLYMETALL»

Defendant

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 2 February 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph 41 of the IAC Arbitration Award dated 24 January 2024 made by Ms. Indira Yeleusizova, the sole arbitrator appointed by a letter dated 7 December 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 40/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order that the Claimant is entitled:

    1) to foreclose on immovable property, namely a land plot with cadastral No. 22:329:039:252, located at the address of Shymkent City, Yenbekshinsky district, Kapal Batyr Street, z. Ontustik Industriyaldy, building 30 (RK0201300740953802), on account of debt repayment in the amount of 239 312 640,95 (two hundred thirty-nine million three hundred twelve thousand six hundred forty point ninety-five hundredths) tenge;

    2) to recover from "BalkhashPolymetal" LLP in favour of "Polymettech" LLP in addition to the amount of debt the funds in the amount of 1 000 000 (one million) tenge, as well as the costs associated with arbitration proceedings in the amount of 6 007 816 (six million seven thousand eight hundred and sixteen) tenge.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Rinat Salimov, Director, Limited Liability Partnership “Polymettech”, Shymkent c., Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

30 January 2024

CASE No: AIFC-C/CFI/2024/0006

89 Parties

Claimants

v

3 Parties

Defendants

JUDGMENT AND ORDER

Justice of the Court:
The Rt. Hon. The Lord Faulks KC

Court

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 24 January 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph 118 of the IAC Arbitration Award dated 28 December 2023 made by Mr. Sergei Vataev, the sole arbitrator appointed by a letter dated 21 June 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 6/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   To recover from the Defendants jointly and severally in favour of each of the following Claimant the amount of indebtedness (principal debt, interest, penalty and fine) and the costs related to the arbitration proceedings:

   (1) Party 1 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 10,000,000, the outstanding amount of interest – KZT 400,000, penalty – KZT 9,703,000, fine – 500,000, in total – KZT 20,603,000, and costs related to the arbitration proceedings – KZT 2,085,587.

   (2) Party 2 (under the Loan Agreement No. dated August (Assignment Agreement No. dated November) and the Loan Agreement No. dated August (Assignment Agreement No. dated November) the amount of principal debt – KZT 6,000,000, outstanding interest amount – KZT 115,000, penalty – KZT 6,000,000, fine – KZT 300,000, in total – KZT 12,415,000, and costs related to the arbitration proceedings – KZT 1,265,785.05.

   (3) Party 3 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 5,000,000, outstanding interest amount – KZT 95,833, penalty – KZT 5,000,000, fine – KZT 250,000, in total – KZT 10,345,833.00, and costs related to the arbitration proceedings – KZT 1,058,868.25.

   (4) Party 4 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 5,000,000, outstanding interest amount – KZT 200,000, penalty – KZT 4,851,500, fine – KZT 250,000, in total – KZT 10,301,500, and costs related to the arbitration proceedings – KZT 1,055,437.

   (5) Party 5 (under the Loan Agreement No. dated August (Assignment Agreement No. dated February ; Assignment Agreement No. dated March) and the Loan Agreement No. dated August (Assignment Agreement No. dated March)) the amount of principal debt – KZT 4,500,000, outstanding interest amount – KZT 86,250, penalty – KZT 4,500,000, fine – KZT 225,000, in total – KZT 9,311,250, and costs related to the arbitration proceedings – KZT 955,409.95.

   (6) Party 6 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 4,000,000, outstanding interest amount – KZT 118,333, penalty – KZT 4,000,000, fine – KZT 200,000, in total – KZT 8,318,333, and costs related to the arbitration proceedings – KZT 856,786.25.

(7) Party 7 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 3,000,000, outstanding interest amount – KZT 57,500, penalty – KZT 3,000,000, fine – KZT 150,000, in total – KZT 6,207,500, and costs related to the arbitration proceedings – KZT 645,034.76.

(8) Party 8 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 3,000,000, outstanding interest amount – KZT 120,000, penalty – KZT 2,910,900, fine – KZT 150,000, in total – KZT 6,180,900, and costs related to the arbitration proceedings – KZT 643,377.

(9) Party 9 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 3,000,000, outstanding interest amount – KZT 57,500, penalty – KZT 3,000,000, fine – KZT 150,000, in total – KZT 6,207,500, and costs related to the arbitration proceedings – KZT 645,034.76.

(10) Party 10 (under the Loan Agreement No. dated August (Assignment Agreement No. dated December)) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 38,333, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,138,333, and costs related to the arbitration proceedings – KZT 438,118.06.

(11) Party 11 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 80,000, penalty – KZT 1,940,600, fine – KZT 100,000, in total – KZT 4,120,600, and costs related to the arbitration proceedings – KZT 437,347.

(12) Party 12 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 38,333, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,138,333, and costs related to the arbitration proceedings – KZT 438,118.06.

(13) Party 13 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 38,333, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,138,333, and costs related to the arbitration proceedings – KZT 438,118.06.

(14) Party 14 (under the Loan Agreement No. dated September and the Loan Agreement No. dated August (Assignment Agreement No. dated December) and the Loan Agreement No. dated August (Assignment Agreement No. dated December)) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 48,750, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,148,750, and costs related to the arbitration proceedings – KZT 439,490.06.

(15) Party 15 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 59,167, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,159,167, and costs related to the arbitration proceedings – KZT 440,869.56.

(16) Party 16 (under the Loan Agreement No. dated August (Assignment

Agreement No. dated February) and the Loan Agreement No. dated September (Assignment Agreement No. dated February)) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 59,167, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,159,167, and costs related to the arbitration proceedings – KZT 440,869.56.

(17) Party 17 (under the Loan Agreement No. dated August (Assignment Agreement No. dated March)) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 38,333, penalty – KZT 2,000,000, fine – KZT 100,000, in total – KZT 4,138,333, and costs related to the arbitration proceedings – KZT 438,118.06.

(18) Party 18 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 80,000, penalty – KZT 1,940,600, fine – KZT 100,000, in total – KZT 4,120,600, and costs related to the arbitration proceedings – KZT 437,347.

(19) Party 19 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 2,000,000, outstanding interest amount – KZT 80,000, penalty – KZT 1,940,600, fine – KZT 100,000, in total – KZT 4,120,600, and costs related to the arbitration proceedings – KZT 437,347.

(20) Party 20 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 1,500,000, outstanding interest amount – KZT 60,000, penalty – KZT 1,455,450, fine – KZT 75,000, in total – KZT 3,090,450, and costs related to the arbitration proceedings – KZT 334,332.

(21) Party 21 (under the Loan Agreement No. dated August (Assignment Agreement No. dated December)) the amount of principal debt – KZT 1,500,000, outstanding interest amount – KZT 28,750, penalty – KZT 1,500,000, fine – KZT 75,000, in total – KZT 3,103,750, and costs related to the arbitration proceedings – KZT 334,659.76.

(22) Party 22 (under the Loan Agreement No. dated August (Assignment Agreement No. dated January) and the Loan Agreement No. dated August (Assignment Agreement No. dated February)) the amount of principal debt – KZT 1,500,000, outstanding interest amount – KZT 28,750, penalty – KZT 1,500,000, fine – KZT 75,000, in total – KZT 3,103,750, and costs related to the arbitration proceedings – KZT 334,659.76.

(23) Party 23 (under the Loan Agreement No. dated August and the Loan Agreement No. dated August (Assignment Agreement No. dated March)) the amount of principal debt – KZT 1,300,000, outstanding interest amount – KZT 24,916, penalty – KZT 1,300,000, fine – KZT 65,000, in total – KZT 2,689,916, and costs related to the arbitration proceedings – KZT 293,275.97.

(24) Party 24 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 40,000, penalty – KZT 970,300, fine – KZT 50,000, in total – KZT 2,060,300, and costs related to the arbitration proceedings – KZT 231,317.

(25) Party 25 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(26) Party 26 (under the Loan Agreement No. dated August and the Loan Agreement No. dated August (Assignment Agreement No. dated October)) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(27) Party 27 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 40,000, penalty – KZT 970,300, fine – KZT 50,000, in total – KZT 2,060,300, and costs related to the arbitration proceedings – KZT 231,317.

(28) Party 28 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(29) Party 29 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(30) Party 30 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 40,000, penalty – KZT 970,300, fine – KZT 50,000, in total – KZT 2,060,300, and costs related to the arbitration proceedings – KZT 231,317.

(31) Party 31(under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(32) Party 32 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(33) Party 33 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(34) Party 34 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(35) Party 35 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(36) Party 36 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(37) Party 37 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 40,000, penalty – KZT 970,300, fine – KZT 50,000, in total – KZT 2,060,300, and costs related to the arbitration proceedings – KZT 231,317.

(38) Party 38 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 40,000, penalty – KZT 970,300, fine – KZT 50,000, and costs related to the arbitration proceedings – KZT 231,317.

(39) Party 39 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 900,000, outstanding interest amount – KZT 27,667, penalty – KZT 900,000, fine – KZT 45,000, in total – KZT 1,872,667, and costs related to the arbitration proceedings – KZT 212,295.35.

(40) Party 40 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 850,000, outstanding interest amount – KZT 16,291, penalty – KZT 850,000, fine – KZT 42,500, in total – KZT 1,758,791, and costs related to the arbitration proceedings – KZT 200,163.47.

(41) Party 41 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 800,000, outstanding interest amount – KZT 15,333, penalty – KZT 800,000, fine – KZT 40,000, in total – KZT 1,655,333, and costs related to the arbitration proceedings – KZT 189,817.58.

(42) Party 42 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 800,000, outstanding interest amount – KZT 32,000, penalty – KZT 776,240, fine – KZT 40,000, in total – KZT 1,648,240, and costs related to the arbitration proceedings – KZT 190,111.

(43) Party 43 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 800,000, outstanding interest amount – KZT 21,583, penalty – KZT 800,000, fine – KZT 40,000, in total – KZT 1,661,583, and costs related to the arbitration proceedings – KZT 190,941.32.

(44) Party 44 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 600,000, outstanding interest amount – KZT 17,750, penalty – KZT 600,000, fine – KZT 30,000, in total – KZT 1,247,750, and costs related to the arbitration proceedings – KZT 149,727.36.

(45) Party 45 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 600,000, outstanding interest amount – KZT 17,750, penalty – KZT 600,000, fine – KZT 30,000, in total – KZT 1,247,750, and costs related to the arbitration proceedings – KZT 149,727.36.

(46) Party 46 (under the Loan Agreement No. dated August and the Loan Agreement No. dated September) the amount of principal debt – KZT 600,000, outstanding interest amount – KZT 17,750, penalty – KZT 600,000, fine – KZT 30,000, in total – KZT 1,247,750, and costs related to the arbitration proceedings – KZT 149,727.36.

(47) Party 47 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 600,000, outstanding interest amount – KZT 11,500, penalty – KZT 600,000, fine – KZT 30,000, in total – KZT 1,241,500, and costs related to the arbitration proceedings – KZT 148,434.75.

(48) Party 48 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(49) Party 49 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(50) Party 50 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(51) Party 51 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 20,000, penalty – KZT 485,150, fine – KZT 25,000, in total – KZT 1,030,150, and costs related to the arbitration proceedings – KZT 128,302.

(52) Party 52 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, the outstanding amount of interest – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings in the amount of KZT 127,742.97.

(53) Party 53 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 500,000, the outstanding amount of interest – KZT 20,000, penalty – KZT 485,150, fine – KZT 25,000, in total – KZT 1,030,150, and costs related to the arbitration proceedings in the amount of KZT 128,302.

(54) Party 54 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(55) Party 55 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(56) Party 56 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(57) Party 57 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(58) Party 58 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 20,000, penalty – KZT 485,150, fine – KZT 25,000, in total – KZT 1,030,150, and costs related to the arbitration proceedings – KZT 128,302.

(59) Party 59 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(60) Party 60 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(61) Party 61 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(62) Party 62 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(63) Party 63 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(64) Party 64 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 20,000, penalty – KZT 485,150, fine – KZT 25,000, in total – KZT 1,030,150, and costs related to the arbitration proceedings – KZT 128,302.

(65) Party 65 (under the Loan Agreement No. dated August) the amount of

principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(66) Party 66 (under the Loan Agreement No. dated August (Assignment Agreement No. dated February)) the amount of principal debt – KZT 500,000, outstanding interest amount – KZT 9,583, penalty – KZT 500,000, fine – KZT 25,000, in total – KZT 1,034,583, and costs related to the arbitration proceedings – KZT 127,742.97.

(67) Party 67 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(68) Party 68 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 400,000, outstanding interest amount – KZT 7,667, penalty – KZT 400,000, fine – KZT 20,000, in total – KZT 827,667, and costs related to the arbitration proceedings – KZT 107,051.07.

(69) Party 69 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(70) Party 70 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 12,000, penalty – KZT 291,090, fine – KZT 15,000, in total – KZT 618,090, and costs related to the arbitration proceedings – KZT 87,096.

(71) Party 71 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(72) Party 72 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(73) Party 73 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(74) Party 74 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 12,000, penalty – KZT 291,090, fine – KZT 15,000, in total – KZT 618,090, and costs related to the arbitration proceedings – KZT 87,096.

(75) Party 75 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT

300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(76) Party 76 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(77) Party 77 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(78) Party 78 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(79) Party 79 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(80) Party 80 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 1,000,000, outstanding interest amount – KZT 19,167, penalty – KZT 1,000,000, fine – KZT 50,000, in total – KZT 2,069,167, and costs related to the arbitration proceedings – KZT 231,201.37.

(81) Party 81 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(82) Party 82 (under the Loan Agreement No. dated September) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 12,000, penalty – KZT 291,090, fine – KZT 15,000, in total – KZT 618,090, and costs related to the arbitration proceedings – KZT 87,096.

(83) Party 83 (under the Loan Agreement No. dated August) the amount of principal debt – KZT 300,000, outstanding interest amount – KZT 5,750, penalty – KZT 300,000, fine – KZT 15,000, in total – KZT 620,750, and costs related to the arbitration proceedings – KZT 86,359.17.

(84) Party 84 (under the Loan Agreement No. dated August) the amount of principal debt - KZT 300,000, outstanding interest amount - KZT 5,750, penalty - KZT 300,000, fine - KZT 15,000, in total - KZT 620,750, and costs related to the arbitration proceedings - KZT 86,359.17.

(85) Party 85 (under the Loan Agreement No. dated September) the amount of principal debt - KZT 300,000, outstanding interest amount - KZT 12,000, penalty - KZT 291,090, fine - KZT 15,000, in total - KZT 618,090, and costs related to the arbitration

proceedings - KZT 87,096.

(86) Party 86 (under the Loan Agreement No. dated August) the amount of principal debt - KZT 1,000,000, outstanding interest amount - KZT 19,167, penalty - KZT 1,000,000, fine - KZT 50,000, in total - KZT 2,069,167, and costs related to the arbitration proceedings - KZT 231,201.37.

(87) Party 87 (under the Loan Agreement No. dated September) the amount of principal debt - KZT 1,000,000, outstanding interest amount - KZT 40,000, penalty - KZT 970,300, fine - KZT 50,000, in total - KZT 2,060,300, and costs related to the arbitration proceedings - KZT 231,317.

(88) Party 88 (under the Loan Agreement No. dated August) the amount of principal debt - KZT 1,000,000, outstanding interest amount - KZT 19,167, penalty - KZT 1,000,000, fine - KZT 50,000, in total - KZT 2,069,167, and costs related to the arbitration proceedings - KZT 231,201.37.

(89) Party 89 (under the Loan Agreement No. dated August) the amount of principal debt - KZT 4,000,000, outstanding interest amount - KZT 76,667, penalty - KZT 4,000,000, fine - KZT 200,000, in total - KZT 8,276,667, and costs related to the arbitration proceedings - KZT 24,284.56.

By no later than 18:00 Astana time on 14 February 2024, being 15 days from the date of the Judgment and Order.

3. The Defendants are given liberty to apply to have this Order set aside within 7 days of service upon it ofthis Order.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimants were represented by Ms. Elena Maksimenko Viktorovna, Counsel at Zan Hub Law Firm and Mr. Akylbek Askarbekovich Kussainov, Managing Partner at Zan Hub Law Firm.

The Defendants were not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

2 August 2024

CASE No: AIFC-C/CFI/2024/0005

BONDHOLDERS (138) OF THE BONDS

Claimants

v

(1) LIMITED LIABILITY PARTNERSHIP NEF QAZAQSTAN

(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.Ş.

Defendants

CLARIFICATION ORDER

Justice of the Court

Justice Tom Montagu-Smith KC

ORDER

1. The Claimants' entitlement to payment under paragraph 2 of the Court's Order of 25 June 2024 ("the Order") shall be divided between them in accordance with the schedule filed by the Claimants on 10 July 2024 ("the Schedule"). Each Claimant shall individually be entitled to the sum set out against their name in the column entitled "Total Debt" in the Schedule.

2. The Schedule shall not be published on the website of the AIFC Court.

3. The First Defendant shall pay the sums due pursuant to paragraph 2 of the Order by making payment to the account of Astana International Exchange Central Securities Depository Limited identified by the Claimants in their Response to Directions dated 15 July 2024.

4. The First Defendant shall pay the sums due pursuant to paragraph 3 of the Order by making payment to the account of Ms. Guldana Mirasheva identified by the Claimants in their Response to Directions dated 15 July 2024.

REASONS

1. On 25 June 2024, I gave judgment for the Claimants. By paragraph 2 of the Order, I ordered the First Defendant to pay the Claimants, in total, KZT 1,888,333,956.03 in respect of the principal debt and penalty. The Claimants were jointly represented and no particular order was sought determining the Claimants' individual entitlement between themselves. By paragraph 4 of the Order, I directed that the Claimants should each be entitled to their individual share of the total sum in proportion to their ownership of the Bonds which were the subject of the proceedings. In my reasons, I made clear that, for each Bond held by an individual Claimant, they would be entitled to 1/3,560,328 of the total sum ordered. I gave permission for any party to apply to the Court for further clarification.

2. On 10 July 2024, the Claimants' representatives wrote to the Court seeking clarification. They provided a schedule ("*the Schedule*") which sets out what the Claimants say is their individual entitlement to the total sum ordered. The details set out in the Schedule appear to be consistent with the terms of my decision. The First Defendant has confirmed that it does not dispute the terms of the Schedule.

3. In the circumstances, I clarify that the Claimants' individual entitlement to their part of the total sum ordered by paragraph 2 of the Order is as set out in the Schedule.

4. The Claimants further request that payment of those amounts should be made to an account held by Astana International Exchange Central Securities Depository Limited. Again, the First Defendant takes no objection to this course.

5. I am happy to direct that payment be made in that way. I clarify, however, that this is not to say that Astana International Exchange Central Securities Depository Limited is itself entitled to any payment. Rather, the Claimants have, by their lawyers, directed that the First Defendant's obligation to pay under paragraph 2 of the Order will be satisfied if payment is made to that entity. It will then be for the Claimants' lawyers to supervise the distribution of those monies and any disagreements which arise will be a matter between the Claimants, their lawyers and Astana International Exchange Central Securities Depository Limited.

6. The Claimants further asked for a direction that the sums due in respect of costs under paragraph 3 of the Order be paid to the Claimants' lawyers. The First Defendant does not object in principle. However, it requires as a condition that the Claimants' lawyers provide information about their tax status. That is not, in my view, an appropriate condition. It has not been argued that the sums awarded in respect of costs are not due because the arrangements between the Claimants and their lawyers are void or otherwise affected by tax considerations. The direction of a single means of payment is simply a convenient way for the First Defendant to pay, rather than making 138 individual payments, with the sums then being remitted on to the Claimants' lawyers, pursuant to the terms of their retainer.

7. I am therefore content to direct that the payments of costs be made to the Claimants' lawyers.

8. Once again, I make clear that this does not confer on the Claimants' lawyers a direct right to receive those funds from the First Defendant. The right belongs to the Claimants and it is the Claimants who will need to pursue execution if the money is not paid. The designation of a single account for payment is intended to simplify things, not to change the party who is owed those sums. The accurate legal analysis is that each individual Claimant owes its lawyers its share of the total costs and the First Defendant owes each individual Claimant that share.

9. I asked the Claimants to provide a schedule similar to the Schedule, providing a breakdown of their individual entitlement to costs. They declined to do so. I do however clarify that each individual Claimant is entitled to a sum equal to 1% of the amount identified in the Schedule as their entitlement under paragraph 2 of the Order.

By Order of the Court,

Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Guldana Mirasheva, Legal representative, Astana, Republic Kazakhstan.

The First Defendant was represented by Mr. Rauan Batykov, Associate Partner at the International Law Firm ILF A&A, Almaty, Republic of Kazakhstan.

The Second Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 June 2024

CASE No: AIFC-C/CFI/2024/0005

BONDHOLDERS (138) OF THE BONDS
(Listed in Annex 1 and Annex 2 to this Judgment)

Claimants

v

(1) LIMITED LIABILITY PARTNERSHIP NEF QAZAQSTAN

(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.Ş.

Defendants

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

ORDER

UPON the Claimants' claims for sums due in respect of 3,560,328 bonds ("the Bonds") issued by the First Defendant pursuant to the terms of a prospectus ("the Prospectus") dated 22 November 2022 held by the Claimants individually in the numbers set out in Annexes 1 and 2 of this Judgment.

AND UPON the Claimants identified in Annex 2 applying to be added to the claim and the Claimants applying to amend the Claim Form.

AND UPON the Claimants' application dated 5 June 2024 for interim remedies.

AND UPON default judgment being entered on 10 April 2024 on the original, unamended claim.

AND UPON hearing counsel for the parties.

IT IS ORDERED THAT:

1. Permission is granted to add the additional claimants identified in the Claimants' Amended Claim Form dated 8 February 2024 and to amend the Claim Form in those terms.

2. The First Defendant shall pay the Claimants the total of **KZT 1,888,333,956.03**, being comprised of:

    1) KZT 1,566,588,320 in respect of the principal debt outstanding under the Bonds; and

    2) KZT 321,745,636.03 in respect of the sums due as a penalty under clause 4.3 of the Prospectus.

3. The First Defendant shall pay the Claimants' costs of the claim, summarily assessed in the sum of **KZT 42,382,164.36**.

4. Each of the Claimants shall be individually entitled to a part of the sums set out at paragraphs 2 and 3 of this order in proportion to their ownership of the Bonds as set out in Annexes 1 and 2 of this Judgment. The parties have permission, if required, to apply to the Court for further clarification.

5. Until further order, the names of the Claimants shall not be published on the AIFC Court website.

6. There shall be no order on the Claimants' application for interim remedies.

JUDGMENT

A. Introduction

1. The Claimants are the holders of bonds ("the Bonds") issued by the First Defendant and guaranteed by the Second Defendant, pursuant to the terms of a prospectus ("the Prospectus") dated 22 November 2022. The Claimants bring this claim to recover sums they say are due but unpaid in respect of the Bonds.

2. The claim was initially commenced on behalf of 107 bondholders and was served on the First Defendant by email on 22 January 2024. The names of those bondholders and the number of Bonds they hold are set out in Annex 1 to this Judgment, which is AIX Security Holders Report No. 48 of 2024 dated 15 January 2024.

3. On 1 February 2024, the Claimants applied to amend the claim and add a number of Claimants as parties. On 8 February 2024, the Claimants filed an amended Claim Form. The purpose of these amendments was to increase the number of bondholders to 138, resulting in an increase in the quantum of the claim. The names of the bondholders who sought to be added and the number of Bonds they hold are set out in Annex 2 to this Judgment, which is AIX Security Holders Report No. 130 dated 8 February 2024.

4. The Claim Form, as amended, was then served on the First Defendant by courier on 23 February 2024. On 15 March 2024, the First Defendant emailed the Court, acknowledging receipt and requesting certain documents. However, it took no steps to submit a defence.

5. On 26 February 2014, the Claimant applied for judgment in default against the First Defendant.

6. On 10 April 2024, I granted the original Claimants judgment in default on their unamended claims and gave consequential directions for submissions on interest and costs. The Claimants had included in their Claim Form a request that the names of the Bondholders not be published on the AIFC Court website. I directed submissions and evidence on that issue and made an order for non-publication in the meantime.

7. On the following day, 11 April 2024, the First Defendant applied to set aside the default judgment and filed a draft defence. The First Defendant acknowledged the debt, but stated that it had paid a substantial part of the debt. It had, it says, paid the coupon in February 2024 and, on 29 March 2024, had paid part of the principal. In addition, the First Defendant disputed the penalty applied for late payment.

8. On 16 April 2024, the Claimants wrote to the Court noting that the judgment of 10 April 2024 did not take into account the amendments and additional Claimants set out in the Amended Claim Form of 8 February 2024. They also filed further submissions on costs and interest as directed.

9. In light of these submissions, on 17 May 2024, I directed that the following issues should be addressed at a hearing, which was subsequently fixed for 20 June 2024:

    1) The Claimants' email of 16 April 2024, which was to be treated as an application to correct or vary the Judgment and to amend the Claim Form, so far as necessary;

2) The First Defendant's application to set aside the default judgment;

3) Whether judgment should be entered on the claim, in whole or in part, on the basis that the First Defendant has no real prospect of defending some or all of the claim;

4) The Claimants' claim for interest (or a "penalty") and costs; and

5) The Claimants' application to prevent publication of the names of the Claimants.

10. On 5 June 2024, the Claimants filed a further application, seeking orders prohibiting the First Defendant from disposing of its assets.

11. In advance of the hearing, the parties have filed written submissions, for which I am grateful. They have helped to narrow the issues considerably.

B. <u>The principal sum and amendment</u>

12. There is now no dispute between the parties as to the sums owed in respect of the principal debt. Both parties agree that the sum due for this is KZT 1,566,588,320. The parties confirmed at the hearing that they agreed to the default judgment of 10 April 2024 being set aside and replaced with a judgment in that amount. For the sake of good order, I give the Claimants permission to add the additional Claimants as parties and to amend the Claim Form in the terms of the Amended Claim Form filed with the Court.

13. The remaining issues between the parties were:

1) Whether the Claimants were entitled to recover the "*penalty*" claimed and, if so, in what amount;

2) Whether the Claimants were entitled to recover their legal fees and, if so, in what amount;

3) Confidentiality of the names of the Claimants; and

4) The Claimants' application for interim relief.

C. <u>Penalty</u>

14. The parties agreed that the terms of their relationship were set out in the Prospectus, which constituted a contract between the parties and was governed by AIFC law.

15. Clause 4.3 of the Prospectus provided as follows:

> *"The Issuer shall pay a penalty to the Bondholders for each day, that follows "Interest payment expiry date" shown in paragraph 3.2, on which any amount payable under the Bonds remains due and unpaid (the "Unpaid Amount"), at the rate equal to the Coupon Rate. The amount of penalty payable per any Unpaid Amount in respect of any Bonds shall be equal to the product of the Coupon Rate, the Unpaid Amount and the number of calendar days on which any such Unpaid Amount remains due and unpaid divided by amount of actual days within the period of 12 months when Bonds are in circulation, rounding the resultant figure to the nearest cent, half of any such cent being rounded upwards."*

16. The Coupon Rate was defined in clause 2.2 of the Prospectus as being "*a fixed interest rate of 20% per annum*".

17. The Claimants' position was that this sum was in effect a provision requiring the First Defendant to pay interest on unpaid sums at the rate of 20% per year.

18. The parties agree that the coupon payment was paid late and, while part of the principal sum has now been paid, it was paid late and part remains unpaid. The Claimants calculate the amount due under clause 4.3 up to 25 June 2024 as KZT 321,745,636.03.

19. The First Defendant takes no issue with the calculation. Nor does it argue that the payment obligation under clause 4.3 is unenforceable. However, it argues that the amount should be reduced to a reasonable sum in accordance with Article 297 of the Kazakhstan Civil Code. Referring to the decision of this Court in *Freedom Finance JSC v Egor Romanyuk* [2022] AIFC 0020 (1 February 2023), where Justice Sir Rupert Jackson reduced an agreed sum of US$5,000,000 to US$100,000, the First Defendant states that the penalty should be reduced to 1/50th of the agreed sum.

20. There is no dispute that the Prospectus is governed by AIFC law. However, the First Defendant's position is that there is no relevant law of "*penalties*" in AIFC law. As a result, the AIFC Regulations fall to be supplemented by the Law of Kazakhstan.

21. The Claimants reject this analysis. Their position is that the position is completely regulated by the AIFC Contract Regulations and the AIFC Damages and Remedies Regulations. They say that, in any event, the penalty is not excessively large and so would not fall to be reduced, even if Article 297 of the Kazakhstan Civil Code applied.

22. The Sources of AIFC law are set out in the Constitutional Statute of the AIFC. Article 4(1) provides:

> *"The Acting Law of the AIFC is based on the Constitution of the Republic of Kazakhstan and consists of:*
>
> *1) this Constitutional Statute; and*
>
> *2) AIFC Acts, which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute; and*
>
> *3) the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts."*

23. By Article 4(3), then, the general Kazakhstan law is incorporated into AIFC law only in relation to matters which are "*not governed by*" AIFC Regulations.

24. The AIFC Contract Regulations codify the law of contract of the AIFC. Part 7 deals with the obligations on parties to perform their contractual obligations. Those provisions are supplemented by Part 2 of the AIFC Regulations on Damages and Remedies.

25. Regulation 21 deals with liquated damages agreements and provides:

*"**Agreed payment for non-performance***

(1) If the contract provides that a party who does not perform is to pay a specified amount to the aggrieved party for non-performance, the aggrieved party is entitled to that amount irrespective of the party's actual loss.

(2) However, despite any agreement to the contrary, the specified amount may be reduced to a reasonable amount if it is manifestly disproportionate to the loss envisaged as capable of resulting from the non-performance and to the other circumstances."

26. The Claimants' position is that Regulation 21 governs the application of Clause 4.3 of the Prospectus.

27. The First Defendant disputes this, arguing that Regulation 21 had no application because it requires agreement to pay "*a specified amount*". In the present case, it is said, the amount was not specified because it no specific money sum is identified. Rather, the penalty continues to accrue on a daily basis, depending on the amount which is unpaid. It therefore needs to be calculated and so is not "*a specified amount*" in the Prospectus.

28. I disagree. I do not consider that the requirement of a "*specified amount*" in Regulation 21 requires a single number to be identified in the contract. It is sufficient, in my view, for the amount to be "*specified*" that there is a mechanism in the agreement for ascertaining the amount due.

29. In any event, if Regulation 21 did not apply to clause 4.3, my view is that the application of the clause would be "*governed by*" AIFC Regulations. Clause 4.3 simply imposes a contractual obligation to pay which can be enforced. Article 64 of the AIFC Contract Regulations requires performance of contractual obligations. The AIFC Damages and Remedies Regulations provide remedies for the enforcement of those obligations by obtaining judgment. The general rules permitting enforcement of contractual obligations are subject to any specific limitations, such as those set out in Regulation 21. As a result, if clause 4.3 did not fall within Regulation 21, it would be enforceable under the general AIFC Contract Regulations. In those circumstances, there is no room to import elements of the Kazakhstan civil code which deal with penalties, even if I am wrong in my primary view that clause 4.3 does fall within Regulation 21.

30. Under Regulations 21, the amount due for non-performance may be reduced to a reasonable amount where the amount agreed is "*manifestly disproportionate*" to the loss envisaged. Under Article 297 of the Kazakhstan Civil Code, a penalty may be reduced if it is "*excessively large*".

31. It is not necessary in this case to decide whether there is any difference of substance between these two tests. In my view, the "*penalty*" in Clause 4.3 of the Prospectus is neither manifestly disproportionate, nor excessively large.

32. The penalty is – in substance – simply a continuation of the interest which was due under the Bonds. No party has suggested that the obligation to make the coupon payment was unenforceable or should be reduced on the basis that the interest rate was excessive. No have I seen anything to indicate that the coupon rate for the bonds was particularly extraordinary. It would therefore be reasonable for the parties to anticipate that, had the First Defendant repaid on time, the money could have been used to purchase similar instruments at similar rates of return. In those circumstances, the "*the loss envisaged as capable of resulting from the non-performance*", within the terms of Regulation 21 would be the Claimants' inability to earn similar returns elsewhere, for

so long as payment was delayed. In those circumstances, the application of the coupon rate to non-payment was an entirely reasonable pre-estimate of the loss which would flow from non-payment.

33. The First Defendant argued that the penalty was unreasonable in part because there would be "*double interest*". In fact, only one interest rate applied at a time. However, I understand the First Defendant's submission to be, in substance, that the interest would be compounded, in part. That is true in that the coupon payment represents interest on the Bond principal and a failure to pay the coupon would attract the penalty. The penalty would therefore be applied both to the principal and to interest on the principal. However, that is not unreasonable. Compound interest is regularly agreed and enforced and may better reflect the actual loss of person who has been kept out of their money. In any event, only a part of the sum due would be compounded in this way.

34. I am fortified in my conclusion by the decision of Justice Higgs KC in *Omarova and Omarov v NEF Qazaqstan Limited Liability Partnership* [2024] SCC 0004 (26 April 2024). In that case, the Judge considered bonds issued pursuant to the same Prospectus as appear in this case and concluded that the penalty under Clause 4.3 was not excessive.

35. I therefore conclude that the penalty is recoverable at the coupon rate of 20%. The parties have agreed the calculation to 25 June 2024 as **KZT 321,745,636.03** and I give judgment for that sum.

36. At the hearing, the Claimants stated that interest should continue to accrue after judgment at the coupon rate. Under the AIFC Contract Regulations, Article 37(1), judgment debts may carry interest. However, in my view, the Claimants' rights under the bonds merge into this judgment, such that the penalty would no longer accrue pursuant to contract. I was not shown any clause in the Prospectus which expressly created a right to post-judgment interest. In those circumstances, I consider that any right to interest will accrue on the judgment, not pursuant to the agreement. In those circumstances, there is no need to make any provision for post-judgment interest in this judgment. I note from reviewing other judgments of this Court that there is no general practice of making such orders.

D. <u>Costs</u>

37. The Claimants seek to recover their legal costs of these proceedings.

38. By Rule 26.5(2) of the AIFC Court Rules:

> *"26.5 If the Court decides to make an order about costs:*
>
> *(1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
>
> *(2) the Court may make a different order."*

39. Under Rule 26.4, the Court has a direction as to whether, how much and when costs are to be paid.

40. The Claimants have succeeded on the claim. I can see no reason why they should not be entitled to recover their legal costs in principle. The real dispute between the parties focused on the nature of the fee agreements entered into by the Claimants and the resulting quantum of their costs claim.

41. The Claimants have each entered into an agreement with their lawyers to pay 1% of the sums

recovered from the Defendants or awarded in a judgment in their favour. In total, the Claimants will be obliged to pay their lawyers KZT 42,382,164.36 under this arrangement, equivalent to approximately US$ 91,000 as at today's date.

42. The First Defendant objects to this claim.

43. As a preliminary point, the First Defendant takes issue with the lawyers acting for the Claimants.

44. The Claimants have been represented in these proceedings by Ms Guldana Mirasheva and Ms Ardak Zhantas. They are not normally in private practice. They work in house for the stock exchange, but their employers have permitted them to take on these proceedings outside their usual working hours.

45. In submissions, the First Defendant's counsel complained that this could result in a conflict of interest as the lawyers could have access to confidential information. No such information was identified and it is very difficult to see what confidential information they could have which could be relevant. The issues between the parties in this claim have been legal. In any event, I do not see how this could be relevant to the issue of costs.

46. I see no difficulty in Ms Mirasheva and Ms Zhantas acting in this way. Ms Mirasheva has rights of audience and the Claimants' lawyers are permitted to represent them in these proceedings and have done so with distinction.

47. The First Defendant also objected to any costs being awarded on the basis of the Claimants' fee arrangements. The First Defendant's position was that the costs regime in this Court assumes that the Court will make orders to compensate "*actual costs*". From that, I understood counsel to mean that costs should not be recoverable until they are actually paid. I disagree with that suggestion. The Claimants' legal fees will be due when this judgment is issued. At that stage, they should be entitled to recover those costs from the First Defendant. It is very often the case that costs for, say, a hearing are claimed before they have actually been paid. What matters is that the liability to pay has arisen.

48. Nor do I see any difficulty in principle in making an award of costs where parties have agreed to a fixed fee, a fee which is conditional on success, or a fee which is a proportion of the final judgment sum. I am not aware of any restrictions which would make such agreements unenforceable. I also consider that it is entirely reasonable for parties to engage lawyers on such terms. They promote access to justice and allow for the efficient determination of high volume cases, such as has been the case in these proceedings.

49. The agreement of a success fee does however make it more difficult to assess the reasonableness of the fees charged. Common law courts are more often faced with costs claims based on hourly rates and time spent. That is not, however, the only way in which lawyers accept instructions and markets are increasingly seeing other forms of fee agreement.

50. The Claimants' lawyers have provided a breakdown of the time they have actually taken in preparing this case. At the hearing, they estimated that, each of the two lawyers handling the claim had spent approximately 100 hours on the claim. On an hourly rate, that would equate to an average of approximately KZT 210,000 per hour, equivalent to about US$ 450 per hour. That, both parties agreed, would be higher than the maximum hourly rate charged in the market. According to the Claimant, rates range from US$200 to US$400 per hour, with some group consultations being

priced at up to KZT 250,000 per hour (about US$ 536 per hour). According to the First Defendant, junior lawyers would charge US$100 to US$150 per hour, senior lawyers around US$250 per hour, with the maximum rate being around US$350 per hour.

51. After the hearing, the Claimants' lawyers provided a more detailed calculation of the time they have spent. In total, they spent 489 hours on preparing the claim. That would result in an hourly rate of approximately KZT 87,000 per hour, roughly US$187 per hour.

52. The Defendant questioned the reliability of these estimates, noting that the Claimants' lawyers had estimated at the hearing that they had spent 200 hours on the case. The present estimate is more than double. In my view, this reflects that fact that (a) it is a difficult thing to estimate without some prior thought and (b) the figures provided are all estimates. If do not doubt the bona fides of the estimates. I do however bear in mind that they are not the product of detailed time recording.

53. Some items were clearly very rough estimates. In particular, item 4 estimated 5 hours per week for taking instructions from and advising the individual Claimants, amounting to 120 hours. Strategy discussions and actions were estimated at 2 hours per week, amounting to 48 hours. However, even applying a generous discount, I would be very surprised if the actual time spent was less than 300 to 350 hours and it is likely to have exceeded that significantly.

54. The question of whether the fees were reasonable is not, however, determined solely by the number of hours actually spent.

55. The value of legal services need not be determined solely by reference to the time it takes to provide them. Given the logistical difficulties of representing 138 different individuals in a single action, the numerous applications that have been issued and the quality and thorough preparation of the Claimants' lawyers in these proceedings, I would have expected them to need to spend more than 300 to 350 hours in total on the case. In my view, it would not be right to reduce the recoverable costs simply because the Claimants' lawyers have managed to be efficient in providing their services.

56. There are also a number of factors which should be taken into account in assessing the reasonableness of the fee agreed by the Claimants.

57. First, the fees were agreed up to recovery or judgment. This claim has been decided within 5 months of issue and without the need for a full trial. Had factual issues been raised, that would likely have required a document phase, preparation of witness evidence and a trial, all of which would have increased the work required significantly. In this case, I note that the First Defendant has always acknowledged its obligation to pay something. Very extensive proceedings were therefore likely not in contemplation when these fees were agreed. Despite that, the Claimants lawyers could be expected to factor into their fees the risk that more substantial work would be required.

58. Second, while the risk of failure in these proceedings was likely low, it is relevant that the Claimants' lawyers would have been paid nothing had the claim failed.

59. Third, a consequence of a success fee is that payment of all fees is deferred to the end of the case. As a result, it is fair for the lawyers to build into the price some element to reflect the delay in receiving payment and, no doubt, the associated credit risk taken by the lawyers.

60. Fourth, I am told by the Claimants that other firms who were approached demanded a 10% success

fee. They presented some evidence of this in the form of the standard terms advertised by a law firm. The First Defendant's counsel disagreed that the market would usually require that level of fees for a claim of this value. However, he did not go so far as to suggest that a fee of less than 1% would have been available in the market.

61. Given the relatively limited issues in these proceedings, I agree that a fee at the level of 10% may not have been reasonable. Nevertheless, it has not been suggested that a success fee of less than 1% would have been available. I also note that this Court's own fees for claims in this value range are 0.5% or 1.5%, depending on whether the claimant is an individual or a legal entity.

62. I was informed by the First Defendant's lawyers that they had charged their client on an hourly rate a total of approximately KZT 10m (c.US$ 21,500). However, I do not consider that the task of the First Defendant's lawyers has been anything like as onerous as the Claimants. The Claimants' lawyers have faced the logistical difficulties associated with separate engagement by 138 separate individuals. Assembling the necessary powers of attorney alone must have been a formidable task. The Claimants have also had to plead out the claim in full, while the Defendants have been able to choose the points they wanted to take. The First Defendant has essentially taken two short points, on penalty and costs. The Claimants have also made various applications in the face of the First Defendant's failure to respond to the claim.

63. The First Defendant was not willing to suggest a sum which it said would be reasonable by way of costs.

64. Stepping back, I note that the average cost per Claimant has been approximately US$600. I doubt that the Claimants could realistically have managed to obtain representation at a significantly lower cost.

65. In my view, the fee agreed by the Claimants was a reasonable one for the circumstances of this case. In those circumstances, I award the Claimants their costs in the full sum claimed, being **KZT 42,382,164.36**.

E. Apportionment between the Claimants

66. The Claimants are individually entitled to the sums due in respect of the Bonds they hold. Further, they each bear individual liability to their lawyers for their part of the legal fees associated with the claim.

67. The Claimants will, it is hoped, continue to pursue their entitlement and, if necessary, enforcement of their claims, together. However, should any issues arise between them, I make clear that their entitlement is several and not joint.

68. Neither party has asked that the judgment sum expressly be separated out between the Claimants. That appears unlikely to cause any practical problems. However, to ensure difficulties do not arise on enforcement, I make clear that each Claimant is entitled to part of the total sum, divided in proportion to their ownership of the total of 3,560,328 Bonds, such ownership to be determined by reference to the Securities Holders Reports No. 48 dated 15 January 2024 and No. 130 dated 8 February 2024 which are reproduced at Annex 1 and Annex 2 to this Judgment respectively. For each Bond held by each Claimant, as set out in the Annexes, the individual Claimant will be entitled to 1/3,560,328 of the total sum awarded under this judgment. This amounts to approximately KZT 542.29 per Bond, comprised of: (a) very slightly more than KZT 440 per Bond in respect of principal;

(b) a little more than KZT 90 in respect of penalty; and (c) just under KZT 12 in respect of costs.

69. In the event of any difficulties arising as a result of needing to distinguish between the entitlements of individual Claimants, the parties have permission to apply to the Court for clarification.

F. Anonymity

70. The Claimants has applied for an order that their names not be published on the AIFC Court website. The First Defendant supports the application.

71. The starting point in the AIFC Court is that proceedings will be held in public. Article 32 of the AIFC Court Regulations states:

> *"**Proceedings to be held in public***
>
> *(1) All hearings, including trials, shall be held in public, except that the Court may direct that a hearing, or any part of it, be held in private if:*
>
> *(a) publicity would defeat the object of the hearing;*
>
> *(b) it involves matters raising national security;*
>
> *(c) it involves confidential information, including information relating to personal financial matters, and publicity would damage that confidentiality;*
>
> *(d) a private hearing is necessary to protect the interests of a party or witness;*
>
> *(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; it involves uncontentious matters arising in the administration of trusts; or the Court considers this to be necessary in the interests of justice.*
>
> *(2) The Court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness, or in the interests of justice."*

72. This reflects an important policy observed in most common law courts that it is important that the public be able to see justice being done. It protects the integrity of the system and reinforces its role and its availability to prospective litigants.

73. The Claimants' position is that the details of their bond holdings is a commercial secret within the meaning of the Kazakhstan Securities Law, such that it should not be disclosed save with a court order and so, by inference, should not be disclosed without good reason.

74. I was told by Ms Mirasheva that other bondholders had not yet made a claim because they were concerned that their ownership of the Bonds might made public.

75. I note that, under Article 32(1)(c), one ground for making a hearing private is that the hearing involves confidential information relating to personal financial matters. It does not seem to me that *every* case which would involve disclosure of personal financial information must be kept

confidential in these courts. However, in this case, I am content to make the order sought in light of the following factors:

1) The number of Claimants;

2) The apparently limited public interest in their identifies;

3) The fact that the substance of the judgment in this case can be made public and so the process of justice can be seen to be done;

4) The fact that the First Defendant does not object and, indeed, supports the application.

G. Injunction

76. In the course of argument, the Claimants' counsel accepted that, if judgment was issued in relatively short order, there would be little utility in the injunction sought.

77. In those circumstances, I make no order on the application for interim remedies.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Guldana Mirasheva (speaker) and Ms. Ardak Zhantas, Legal representatives.

The First Defendant was represented by Mr. Rauan Batykov (speaker), Associate Partner at the International Law Firm ILF A&A.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 April 2024

CASE No: AIFC-C/CFI/2024/0005

BONDHOLDERS (107) OF THE BONDS

Claimant

v.

(1) LIMITED LIABILITY PARTNERSHIP NEF QAZAQSTAN
(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.S

Defendants

JUDGMENT AND ORDER

Justice of the Court
Justice Tom Montagu-Smith KC

ORDER

UPON the Claimants' claim for sums due in respect of bonds ("**the Bonds**") issued by the First Defendant and guaranteed by the Second Defendant.

AND UPON the Claimants' application for judgment in default.

IT IS ORDERED THAT:

1. Judgment is entered in default against the First Defendant in favour of the Claimants for:

    a. KZT 2,485,760,000 in respect of the sums due on redemption of the Bonds;

    b. KZT 248,576,000 in respect of the coupon due for the period 24 to 30 November 2023;

    c. KZT 80,274,084 in respect of interest up to the date of issue of the claim being 17 January 2024.

2. The First Defendant shall pay the Claimants' costs of their claim against the First Defendant, to be the subject of detailed assessment if not agreed.

3. The Claimants shall, by 18:00 Astana time on 24 April 2024:

    a. File and serve on the First Defendant any submissions or calculation for any further interest claimed for the period from 17 January 2024 up to the date of this judgment;

    b. File and serve on the First Defendant any request for a payment on account of the costs referred to at paragraph 2 of this Order.

    c. File and serve submissions and any evidence relied on in support of their application preventing the publication of their names on the AIFC Court website.

4. The identities of the Claimants shall not be published on the AIFC Court website until determination of the Claimants' application for non-publication of their names.

5. Save as set out in paragraph 2 above, the Claimants' costs are reserved.

6. Permission to apply.

Reasons

1. The Claimants are 107 holders of bonds issued by the First Defendant and guaranteed by the Second Defendant. They claim that the bonds have matured but no payments have been received. They bring this claim against the First Defendant as the bond issuer and against the Second Defendant as the guarantor of the bonds.

2. The Claimants filed the claim on 22 January 2024. On 26 February, they filed a certificate of service, confirming that they had served the proceedings on the First Defendant. The claim form and supporting documents were sent to two email addresses on 22 January 2024 and by courier on 23 February 2024.

3. I am entirely satisfied that the steps taken have been sufficient to bring the documents to the

attention of the First Defendant by, at the latest, 26 February 2024 and so amount to service within AIFC Court Rule 5.3.

4. One of the email addresses had apparently been used recently by the First Defendant and was identified in public announcements as a contact email for use in casting absentee ballots. It appears that a read receipt was also received from at least one of the addresses. A DHL receipt has been provided for courier delivery. In addition, on 15 March 2024, the AIFC Court received a communication from a lawyer acting on behalf of the First Defendant, stating that the Claim Form had been received in hard copy by the First Defendant on 26 February 2024. Given the response to the courier delivery and the lack of response to the email delivery, it may be that the email delivery was not effective by itself, but I do not need to decide that. By 26 February 2024 at the latest, the documents were with the First Defendant.

5. By default, the First Defendant was required to file an acknowledgment of service within 14 days of service, with a defence due 14 days later. Assuming service on 22 January, the acknowledgment would have fallen due on 5 February 2024 and the defence on 19 February. The Court confirmed the latter deadline to the parties on 22 January 2024. Even if service was not achieved until 26 February 2024, the acknowledgment of service would have been due on 11 March and the Defence due on 25 March.

6. The First Defendant has filed neither an acknowledgment of service nor a defence and the time for doing so has now, on any view, expired.

7. On 26 February 2024, the Claimants filed an application seeking judgment in default against the First Defendant. Under Rule 9.4, a Claimant may obtain judgment in default if no acknowledgment of service or defence has been filed and the time for doing so has expired. The application may be made without notice. In the circumstances, I am satisfied that those conditions are met. As the Claimants point out, Rule 9.15(1) permits judgment against one defendant where the claim can be dealt with separately from the claim against other defendants. I agree with the Claimants that that is possible. I grant judgment in default accordingly.

8. The First Defendant is at liberty to apply under Rule 9.19 for an order setting aside this default judgment. However, any such application must be made promptly, in accordance with Rule 9.20.

9. The Claimants' claim form contained a calculation of interest (referred to as a "penalty") up to the date of issue of the claim form. Some time has now passed since that date. The Claimants are therefore invited to provide any further submissions or calculation of interest for the period between issue and the date of this judgment. Such submissions should be provided within the next 14 days.

10. The Claimants included in their claim a sum in respect of their legal costs. Those are not part of the substantive claim. However, the Claimants are entitled to recover their costs in principle and I make an order accordingly. Those costs will need to be the subject of assessment if they cannot be agreed. However, in the interim, the Claimants may apply for a payment on account of those costs under Rule 26.7. Any such request should be made, supported by evidence and a detailed explanation of the costs claimed, within 14 days.

11. In their application of 26 February 2024, the Claimants also seek an extension of the default period for service of the claim form on the Second Defendant outside Kazakhstan. An extension is required, they say, because the Second Defendant must be served through official channels pursuant to a treaty between Kazakhstan and Turkey. It is not obvious to me that the Treaty's terms about service of civil process are mandatory. No doubt, however, absent good reason, it is the appropriate mechanism for service, given the two states have agreed to it. However, at present, I see no need for an extension of time. The time to serve the claim form outside Kazakhstan is 6 months by default: Rule 4.9(2). The extension sought is to 22 July 2024. That is exactly 6 months after issue of the claim

form. In the circumstances, no extension is required. If the Claimants need time beyond 22 July 2024, they are invited to request it. It may be however that that application can be made, if it is needed, closer to the date of expiry of the claim form.

12. In their claim form, the Claimants have sought an order that their names should not be published on the AIFC Court website. At present, I am not persuaded that I should make such an order. However, in my view, the Claimants should have the opportunity to pursue that application. I therefore direct that they file further submissions to support that application. If necessary, I shall direct a short hearing to consider the application further. In the meantime, I will make an order preventing publication to ensure that the application is not made redundant.

13. The Claimants also seek a group litigation order. It seems to me that there may be no need for such an order. This may turn on whether the Second Defendant engages with proceedings and the issues which are raised. I will not therefore consider that application further at this stage. However, the Claimants are at liberty to pursue that application later, should they so wish.

By Order of the Court,

Justice Tom Montagu-Smith KC
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Guldana Mirasheva, Legal representative, Astana, Kazakhstan.

The First Defendant was represented by Mr. Nurlybek Sultan Nusipzhanov, Lawyer, ILF A&A, Almaty, Kazakhstan

The Second Defendant was not represented.

IN THE SMALL CLAIMS COURT
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

2 August 2024
CASE No: AIFC-C/SCC/2024/0004

(1) MS. AISULU OMAROVA
(2) MR. ALTAI OMAROV

Claimants

v

(1) NEF QAZAQSTAN LIMITED LIABILITY PARTNERSHIP
(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.Ş.
JOINT STOCK COMPANY

Defendants

JUDGMENT ON APPLICATIONS IN RESPECT OF COSTS

Justice of the Court:
Justice Josephine Higgs KC

JUDGMENT

1.1. The Claimants, Ms. Omarova Aisulu Izataevna and Mr. Omarov Altai Salauatovich, commenced a claim against NEF Qazaqstan LLP (the "**First Defendant**") and Timur Gayrimenkul Geliştirme Yapi ve Yatirim A.Ş. JSC (the "**Second Defendant**") (collectively the "**Defendants**"), by submitting a Claim Form to the AIFC Court which was issued by the Court on 17 January 2024.

1.2. In their Claim Form the Claimants claimed, in summary, repayment of matured bonds KZX000001185 (the "**Bonds**") issued by the First Defendant and guaranteed by the Second Defendant, interest, penalties and costs.

1.3. By a Judgment dated 26 April 2024 (the "**Judgment**"), I held that the First and Second Defendants were liable to repay the principal sums, penalties and interest, and ordered the Defendants to pay the amounts set out in paragraph 7 of the Judgment.

1.4. In their Claim Form, the Claimants also sought costs / attorney's fees. Paragraph 6.1 of the Judgment recorded that Rule 26.9 of the AIFC Court Rules provides that the Small Claims Court may not order a party to pay a sum to another party in respect of costs, fees and expenses except for such part of any Court fees as the Small Claims Court considers appropriate, or such further costs as the Small Claims Court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.

1.5. Paragraph 6.2 of the Judgment recorded that I did not at that time consider that a costs order was appropriate, and that I did not have any information as to the amount of costs incurred by the Claimants.

1.6. However, by paragraph 6.3 of the Judgment I permitted the Claimants, if so advised, to file a written statement of costs setting out the amounts claimed and brief grounds on which costs were sought within 28 days of the date of this Judgment, and permitted the Defendants, if so advised, to file any response within 28 days thereafter. Paragraph 6.3 stated that I would then determine the Claimants' claim for costs on the papers.

1.7. The Claimants duly made an application for costs dated 22 May 2024. In accordance with paragraph 6.3 of the Judgment, the Claimants' application set out the amounts claimed, which total USD 5,215, and the brief grounds on which costs were sought. The Claimants submitted that they were entitled to the full amount of costs: the claim had been successful and the general rule is that the unsuccessful party is ordered to pay the costs of the successful party, the Claimants had required legal assistance in order to litigate before the AIFC Court, and the sum claimed was reasonable and was supported by the statement of costs.

1.8. The Defendants did not file a response within 28 days thereafter. The Defendants were reminded of the deadline by emails from the Registry dated 22 May 2024 and 9 July 2024. The Claimants made an application for default judgment dated 9 July 2024.

1.9. Having considered the Claimants' application for costs and application for default judgment, I dismiss the Claimants' applications for the reasons set out below.

1.10. As the Claimants note, they were the successful parties, and the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (Rule 26.5 of the AIFC Court Rules).

1.11. However, by Rule 26.9 of the AIFC Court Rules, the Small Claims Court does not have the power to order a party to pay a sum to another party in respect of costs, except (1) for such part of any Court fees as the Small Claims Court considers appropriate, or (2) such further costs as the Small Claims Court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.

1.12. The Claimants have not incurred any Court fees, so (1) does not arise.

1.13. I have carefully considered whether I should order the Defendants to pay the legal costs which the Claimants have incurred, on the basis that the Defendants have behaved unreasonably.

1.14. I do not consider that it would be appropriate to do so. In considering whether the Defendants have behaved unreasonably, I have taken account of the fact that the First Defendant originally failed to serve a Defence in time, that the First Defendant unsuccessfully defended the claim for penalties, and that the Second Defendant did not serve a Defence at any time. Nonetheless, I do not consider that the Defendants have acted "unreasonably" for the purposes of Rule 26.9. In particular, I note that the First Defendant explicitly acknowledged in its Defence that the principal sums claimed were due, and only defended the claim for penalties. I also bear in mind that the First Defendant did not object to the Claimants' Claim being determined on the papers, or otherwise act in a way which materially increased the costs incurred. In all the circumstances, I am not persuaded that this would be an appropriate case in which to make an award of costs pursuant to Rule 26.9(2).

1.15. I do not consider that the Claimants are entitled to default judgment on their application for costs, pursuant to Rule 9 of the AIFC Court Rules, as submitted in the Claimants' application for default judgment. I do not consider that Rule 9 is applicable. Pursuant to paragraph 6.3 of the Judgment, the Defendants had permission to file a response to the Claimants' application, if so advised, but they were not required to file a response. Paragraph 6.3 of the Judgment made clear that I would determine the Claimants' application for costs on the papers. Accordingly, the fact that the Defendants did not file any response does not mean that the Claimants should be entitled to default or automatic judgment on their application for costs.

1.16. For the reasons set out above, the Claimants' applications are dismissed.

By Order of the Court,

Josephine Higgs KC,
Justice, AIFC Small Claims Court

Representation:

The Claimants were represented by Mr. Bakhyt Tukulov, Partner, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The First Defendant was represented in these proceedings by Mr. Nurlybek Sultan Nusipzhanov, ILF A&A Limited Liability Partnership, Almaty, Republic of Kazakhstan, but did not submit a response to the applications.

The Second Defendant was not represented.

IN THE SMALL CLAIMS COURT
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 April 2024
CASE No: AIFC-C/SCC/2024/0004

(1) MS. AISULU OMAROVA

(2) MR. ALTAI OMAROV

Claimants

v

(1) NEF QAZAQSTAN LIMITED LIABILITY PARTNERSHIP

(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.Ş.
JOINT STOCK COMPANY

Defendants

JUDGMENT

Justice of the Court:

Justice Josephine Higgs KC

JUDGMENT

This Judgment is structured as follows:

PART 1. INTRODUCTION

1.1 The Claimants, Ms Omarova Aisulu Izataevna and Mr Omarov Altai Salauatovich, commenced a claim against NEF Qazaqstan LLP (the "**First Defendant**" or the "**Issuer**") and Timur Gayrimenkul Geliştirme Yapi ve Yatirim A.Ş. JSC (the "**Second Defendant**" or the "**Guarantor**") (collectively the "**Defendants**"), by submitting a Claim Form to the AIFC Court which was issued by the Court on 17 January 2024.

1.2 In their Claim Form the Claimants claim, in summary, repayment of matured bonds KZX00000118 (the "**Bonds**") issued by the First Defendant and guaranteed by the Second Defendant, interest, penalties and costs.

Procedural history

1.3 On 17 January 2024, the Registry served the Claim Form on the Defendants by email and advised the parties that the claim would be determined by the AIFC Small Claims Court in accordance with Part 28 of the AIFC Court Rules.

1.4 Pursuant to Rule 28.12 of the AIFC Court Rules, the Defendants were required, within 14 days after being served with the Claim Form, being Wednesday 31 January 2024, to admit the claim, file a defence, or make an application to dispute the jurisdiction of the AIFC Small Claims Court. The Defendants were informed of this deadline by the email from the Registry dated 17 January 2024, and were reminded by a further email from the Registry on 29 January 2024. The Defendants did not take any of those steps by 31 January 2024.

1.5 On 9 February 2024, the Claimants made an application to file an Amended Claim Form. The application was said to be made pursuant to Rules 11.38(2) and 11.48 of the AIFC Court Rules (albeit that those Rules do not strictly apply to the AIFC Small Claims Court). The Claimants also filed a Certificate of Service of the Claim Form dated 7 February 2024. The proposed amendments were to reduce the quantum of the claim, in light of payments made by the First Defendant to the Claimants since the Claim Form was issued.

1.6 By an order dated 6 March 2024 (the "**Order**"), I allowed the Claimants' application to amend their Claim Form. I further ordered that: the Claimants should serve the Order and Amended Claim Form on the Defendants and file a certificate of service in accordance with Rule 5.26 of the AIFC Court Rules, within 14 days of the date of the Order; and that the Defendants should take the steps set

out in Rule 28.12 of the AIFC Court Rules within 14 days after being served with the Order and the Amended Claim Form.

1.7 Paragraph 4 of the Order provided that the Claim would be determined on the papers without a hearing, pursuant to Rule 28.39 of the AIFC Court Rules, unless either the Claimants or the Defendants requested a hearing.

1.8 On 20 March 2024, the Claimants duly filed a Certificate of Service pursuant to paragraph 2 of the Order.

1.9 On 1 April 2024, the First Defendant filed a Defence. In its Defence, the First Defendant states that a further instalment payment towards the bond principal was remitted by the First Defendant on 29 March 2024, and "*acknowledges its duty to fulfill the monetary obligations outlined in the bond agreements with Claimant 1… for the sum of KZT 20,000,000, and with Claimant 2, Mr Omarov, for the sum of KZT 10,000,000*". The Defence further states: "*This financial obligation is fully acknowledged by Defendant 1 and will not be contested or waived under any circumstances*".

1.10 No Defence has been filed by or on behalf of the Second Defendant.

1.11 By an email to the Registry dated 11 April 2024, in response to a request for information from the Registry dated 11 April 2024:

1.11.1 The Claimants confirmed that they admitted that payments had been made on 29 March 2024 in the amount of KZT11,196,380.69 for the First Claimant and KZT 5,598,190.34 for the Second Defendant, which they stated amounted to 56% of the bond principal.

1.11.2 The Claimants stated that the principal debt which was owed by the Defendants was the amount of KZT 8,803,619.31 for the First Claimant and KZT 4,401,809.66 for the Second Claimant.

1.11.3 The Claimants stated that as at 11 April 2024, penalties have accrued in the amount of KZT 1,409,560.01 for the First Claimant and KZT 704,779.99 for the Second Claimant.

Jurisdiction of the AIFC Small Claims Court

1.12 In the Claim Form, it is stated the AIFC Court has jurisdiction over the Claimants' claims against the Defendants based on the prospectus for the Bonds prepared by the Issuer (the "**Prospectus**"), which is exhibited at Exhibit 4 to the Claim Form.

1.13 The Prospectus in Clause 2.1 on page 28 provides as follows:

"*The Bonds and any non-contractual obligations, arising out of, or in connection with, the Bonds shall be governed by, and construed in accordance with the laws of the AIFC. The Issuer has agreed herein the conditions in favor of the Bondholders that any claim, dispute or discrepancy of any nature arising out of, or in connection with the Bonds (including claims, disputes or discrepancies regarding the existence, termination thereof, or any non-contractual obligations arising out of, or in connection with the Bonds) shall be brought to, and finally resolved by the Court of the AIFC in*

accordance with the rules thereof, currently in effect, such rules shall be deemed incorporated herein".

1.14 The Prospectus on pages 40-55 contains the "Schedule 3 Guarantee Agreement" dated 28 October 2022 between the Guarantor and the Issuer in favour of the bondholders (the "**Guarantee**").

1.15 The Guarantee on page 54 in Art. 19 "Jurisdiction" includes the following jurisdictional clause:

"*Each party irrevocably agrees that, subject as provided below, the courts within Astana International Financial Centre shall have exclusive jurisdiction over any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this guarantee or its subject matter or formation. Nothing in this clause shall limit the right of the Bondholder to take proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction".*

1.16 The Claimants allege that, as a result of these provisions, the AIFC Court has jurisdiction over their claims against the First Defendant and the Second Defendant arising out of the default on the Bonds. The AIFC Court's jurisdiction is not disputed in the Defence, and neither of the Defendants has made an application contesting the jurisdiction.

1.17 The Court is satisfied that the AIFC Small Claims Court has jurisdiction over the Claimants' claims, for the reasons set out above.

1.18 None of the parties has requested a hearing. Accordingly, pursuant to Rule 28.39 of the AIFC Court Rules and paragraph 4 of the Order, I have considered this Claim on the papers and determine it as follows.

PART 2. THE CLAIMANTS' CLAIMS

2.1 The Claimants allege the following facts in their Amended Claim Form. None of these facts is disputed by the First Defendant in its Defence.

2.2 The First Claimant invested KZT 20,000,000 and acquired 20,000 Bonds; the Second Claimant invested KZT 10,000,000 and acquired 10,000 Bonds. These investments are recorded in the Securities Movement Report exhibited at Exhibit 5 of the Claim Form.

2.3 The maturity date for the Bonds was 23 November 2023 with an interest rate of 20 % per annum payable on a semi-annual basis.

2.4 The first interest payments in the amounts of KZT 2,000,000 (for the First Claimant) and KZT 1,000,000 (for the Second Claimant) respectively were scheduled to be paid within 7 calendar days from 24 May 2023 and were paid on 30 May 2023.

2.5 The second interest payments and principal debt were due to be paid by 1 December 2023.

2.6 The Issuer did not pay the second interest payments or the principal debt at that time. It subsequently paid the second interest payment on 30 January 2024 and (as explained below), later repaid part of the principal debt.

2.7 On 30 November 2023, the Issuer sent a notice to the bondholders (exhibited at Exhibit 3 to the Claim Form) stating that it was experiencing financial difficulties but was taking measures to fufill its obligations to the bondholders. The notice stated: "*In light of the above, we ask you to take into account that the Company will fulfill all its obligations to Bondholders in 15 (fifteen) working days, but by no later than December 21, 2023 (inclusive).*" Paragraph 6 of the notice also recorded that the Issuer was obliged to pay a penalty to the bondholders pursuant to paragraph 4.3 of the Prospectus.

2.8 However, the Issuer did not repay the principal debt by December 21, 2023 and had not done so as at the date on which the original Claim Form was filed.

2.9 On 8 January 2024 the Claimants sent a Notice of Default and Guarantee Trigger Event. This is exhibited at Exhibit 6 to the Claim Form.

2.10 The Claimants allege they are entitled to the payment of the principal debt and penalties, and that the Guarantor and the Issuer are jointly liable for this payment. As explained below, there is no dispute regarding the Issuer's liability for repayment of the principal debt, but the Claimants' claim for penalties is contentious.

2.11 The Claimants allege that the dispute is governed by AIFC law, since both the Prospectus and Guarantee provide that AIFC is the applicable law. The First Defendant, in paragraph 5 of its Defence, accepts that the law applicable to the Bonds is AIFC Law.

PART 3. CLAIM FOR PRINCIPAL DEBT

3.1 There is no dispute that the First Defendant became liable to repay the principal debt to the Claimants. As recorded in paragraph 1.9 above, in its Defence, the First Defendant acknowledges its duty to repay the principal sums invested and states that this obligation will not be contested.

3.2 As regards the payments made on 29 March 2024, in its Defence, the First Defendant does not specific the sums paid, but states that it has discharged 52.94% of the bond principal.

3.3 In their email of 11 April 2024, the Claimants have provided the exact figures paid by the First Defendant on 29 March 2024 and state that 56% of the bond principal has been paid. The First Defendant has not responded to that email, and I therefore proceed on the basis that the figures set out in the Claimants' email of 11 April 2024 are undisputed and are correct.

3.4 Accordingly, based on the allegations made in, and the documents exhibited to, the Claim Form, the First Defendant's admission in its Defence, and the further information provided by the Claimants by email on 11 April 2024, I find that the First Defendant owes the First Claimant the sum of KZT 8,803,619.31 and owes the Second Claimant the sum of KZT 4,401,809.66.

PART 4. CLAIM FOR PENALITES

4.1 The Claimants claim that they are also entitled to payment of penalties.

4.2 The Claimants note that the AIFC Contract Regulations No. 3 of 2017 (the "**Contract Regulations**") established both freedom of contract (Rule 8.1 of the Contract Regulations) and its binding character (Rule 10 of the Contract Regulations). They assert that the Prospectus and the Guarantee as contracts provide an outline of the parties' rights and obligations.

4.3 In support of their claim for penalties, the Claimants refer to paragraph 4.3 on page 32 of the Prospectus, which they contend provides that the First Defendant is obliged to pay the penalties sought. This provides as follows:

"*The Issuer shall pay a penalty to the Bondholders for each day, that follows "Interest payment expiry date" shown in paragraph 3.2, on which any amount payable under the Bonds remains due and unpaid (the "Unpaid Amount"), at the rate equal to the Coupon Rate. The amount of penalty payable per any Unpaid Amount in respect of any Bonds shall be equal to the product of the Coupon Rate, the Unpaid Amount and the number of calendar days on which any such Unpaid Amount remains due and unpaid divided by amount of actual days within the period of 12 months when Bonds are in circulation, rounding the resultant figure to the nearest cent, half of any such cent being rounded upwards*."

4.4 The Claimants set out the methodology for the calculation of penalties in paragraph 22 of their Amended Claim Form, and the amounts due by way of penalty as at the date of filing the Amended Claim Form in paragraph 23. The Claimants state in their email dated 11 April 2024 that the penalties which had accrued by 11 April 2024 are as follows:

4.4.1 KZT 1,409,560.01 for the First Claimant; and

4.4.2 KZT 704,779.99 for the Second Claimant.

The First Defendant's Defence to the claim for penalties

4.5 In its Defence, the First Defendant states that it does not contest the method of calculation of the penalty, but it disputes the availability of penalties as a remedy under AIFC law.

4.6 The First Defendant states, in paragraph 7 of its Defence, that the Prospectus constitutes the primary contract between the Issuer and the Bondholder. The First Defendant asserts that the Prospectus is subject to the requirements of the Contract Regulations.

4.7 The contractual status of the Prospectus, and the applicability of the Contract Regulations is therefore common ground as between the First Defendant and the Claimants.

4.8 The First Defendant further asserts, in paragraphs 8 and 9 of its Defence, that the Contract Regulation and the Regulations on Damages and Remedies (No. 17 of 2019) do not include any

reference to “penalties”. The First Defendant therefore considers that AIFC laws do not encompass penalties as a form of remedy. (I discuss this point in paragraph 4.16 below).

4.9 As I understand paragraphs 10 to 11 of the Defence, the First Defendant does not contend that the principle of unenforceability of penalties under English law is applicable and that the penalty should not be enforced on this basis.

4.10 Rather the First Defendant contends, in paragraph 12 of its Defence, that pursuant to sub-paragraph 1(3) of Article 4 of the Constitutional Law, the provisions of the legislation of the Republic of Kazakhstan regarding penalties may be applied by this Court. The First Defendant asks this Court to reduce the penalty amount under the Law of the Republic of Kazakhstan, specifically Article 297 of the Civil Code.

4.11 The First Defendant refers at paragraph 17 of its Defence to *Freedom Finance JSC v Egor Romanyuk* (Judgment of the AIFC Court of First Instance dated 1 February 2023) in which the AIFC Court reduced the penalty under Article 297 of the Civil Code.

4.12 The First Defendant contends that the penalty sought by the Claimants in this case is disproportionate and excessive. As I understand paragraphs 21 and 22 of its Defence, the basis for this contention is that the penalty rate is equivalent to the coupon rate.

The Claimants’ response

4.13 The Claimants object to the reduction of the penalty rate based on Article 297 of the Civil Code of the Republic of Kazakhstan which they say is inapplicable. They assert that the penalty is not excessive as it represents the type of liability for late performance of a monetary obligation by the Issuer that has been specifically provided for in the Prospectus. The Claimants further say that the 20% penalty is fully comparable to the interest rate for failure to pay amount under paragraph 17(2) of AIFC Regulations on Damages and Remedies. They assert that the rate of 20% is the average bank short-term lending rate for the currency of payment (KZT) at the place for payment (Republic of Kazakhstan), noting that these rates vary from 18-33% based on the National Bank data.

Conclusion

4.14 Having considered the First Defendant’s Defence, and the Claimants’ response in their email of 11 April 2024, together with the case of *Freedom Finance JSC v Egor Romanyuk* (particularly paragraphs 5.2 to 5.27 and 6.13 thereof), I consider that it is not appropriate to reduce the penalty pursuant to Article 297 of the Civil Code.

4.15 I accept the Claimants’ submissions in their email of 11 April 2024 that the penalty is not excessive. Although it is described in Clause 4.3 of the Prospectus as a "penalty" the effect of Clause 4.3 is that the Issuer is simply required to continue to pay interest to the bondholders at the coupon rate on any sums which remain unpaid at the maturity date. Further, the rate of 20% is broadly comparable to the interest rate which would apply under paragraph 17(2) of the AIFC Regulations on Damages and Remedies. There was no delay by the Claimants in submitting their claim to the AIFC Court, or in the conduct of this claim, which has caused the penalties payable to accrue unduly and which would justify a reduction on that basis. I also note that the Notice sent by the First

Defendant to the bondholders on 30 November 2023 (referred to in paragraph 2.7 above) referred explicitly to the First Defendant's obligation to pay a penalty under paragraph 4.3 of the Prospectus, implying the First Defendant acknowledged and accepted that obligation. For all these reasons I do not consider that it is appropriate to reduce the penalty based on Article 297 of the Civil Code.

4.16 I also note that the AIFC Regulations on Damages and Remedies provide at paragraph 21 "Agreed payment for non-performance" that if the contract provides that a party who does not perform is to pay a specified amount to the aggrieved party for non-performance, the aggrieved party is entitled to that amount irrespective of the party's actual loss but that, pursuant to paragraph 21(2), the specified amount may be reduced to a reasonable amount if it is manifestly disproportionate to the loss envisaged as capable of resulting from the non-performance and to the other circumstances. Although the First Defendant does not rely on paragraph 21(2), I am further satisfied that the amount claimed is not manifestly disproportionate and that it is not appropriate to reduce the penalty based on this provision.

4.17 Accordingly, I find that the First Defendant owes the following amounts pursuant to Clause 4.3 of the Prospectus as at 11 April 2024:

4.17.1 KZT 1,409,560.01 to the First Claimant; and

4.17.2 KZT 704,779.99 to the Second Claimant.

4.18 I calculate that the further amounts which have accrued from 11 April 2024 to the date of this Judgment are as follows:

4.18.1 KZT 72,358.51 to the First Claimant; and

4.18.2 KZT 36,179.26 to the Second Claimant.

4.19 The total amounts due from the First Defendant, by way of payment of the principal debt and penalties, as at the date of this Judgment are therefore as follows:

4.19.1 KZT 10,285,537.83 to the First Claimant; and

4.19.2 KZT 5,142,768.91 to the Second Claimant.

PART 5. CLAIMS AGAINST THE SECOND DEFENDANT

5.1 The Claimants contend that, having established the Issuer's liability, the Claimants may jointly demand performance from the Guarantor. They refer to Article 5.1 "Execution and Delivery of Guarantee" and contend that Guarantee Trigger Events have occurred. They further allege that the Guarantor has admitted its obligations to the Claimants in a statement dated 12 December 2023, which is exhibited at Exhibit 7 to the Claim Form.

5.2 The Second Defendant has not filed a Defence. The Defence filed by the First Defendant does not dispute the Claimants' assertions that the Second Defendant is also liable.

5.3 Based on the allegations made in the Claim Form, and the documents exhibited to the Claim Form, I am satisfied and I find that the Guarantor is jointly and severally liable for the non-fulfilment of the Issuer's obligations.

5.4 I therefore find that the total amounts owed by the Second Defendant as at the date of this Judgment are as follows:

5.4.1 KZT 10,285,537.83 to the First Claimant; and

5.4.2 KZT 5,142,768.91 to the Second Claimant.

PART 6. COSTS

6.1 In their Claim Form, the Claimants also seek costs / attorney's fees. Rule 26.9 of the AIFC Court Rules provides that the Small Claims Court may not order a party to pay a sum to another party in respect of costs, fees and expenses except for such part of any Court fees as the Small Claims Court considers appropriate, or such further costs as the Small Claims Court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.

6.2 I do not currently consider that a costs order is appropriate in this case, and I do not have any information as to the amount of costs incurred by the Claimants.

6.3 However, the Claimants are permitted, if so advised, to file a written statement of costs setting out the amounts claimed and brief grounds on which costs are sought within 28 days of the date of this Judgment. The Defendants are permitted, if so advised, to file any response within 28 days thereafter. I will then determine the Claimants' claim for costs on the papers.

PART 7. CONCLUSION

7.1 For the reasons set out above, THE COURT ORDERS THE FIRST DEFENDANT AND SECOND DEFENDANT TO PAY THE SUM OF KZT 10,285,537.83 TO THE FIRST CLAIMANT AND THE SUM OF KZT 5,142,768.91 TO THE SECOND CLAIMANT WITHIN 28 DAYS FROM TODAY'S DATE.

By Order of the Court,

Josephine Higgs KC,
Justice, AIFC Small Claims Court

Representation:

The Claimants were represented by Mr. Bakhyt Tukulov, Partner, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The First Defendant was represented by Mr. Nurlybek Sultan Nusipzhanov, ILF A&A Limited Liability Partnership, Almaty, Republic of Kazakhstan.

The Second Defendant was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 February 2024

CASE No: AIFC-C/SCC/2024/0003

(1) Mr. Serik Kusayev
(2) Mr. Rakhat Bolatov

Claimants

v

Private Company "GEOPS Exploration Kazakhstan Ltd."

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner KC

ORDER

1. **The Claim is allowed.**

2. **The Defendant shall pay the Claimant 1, Mr. Serik Kusayev, 1 653 069 KZT and the Claimant 2, Mr. Rakhat Bolatov, 1 153 069 KZT within 21 days of this Order.**

JUDGMENT

1. On 30th March 2023, the Claimants entered an agreement ("**the Agreements**") with the Defendant in resolution of their employment dispute.

2. Under the Agreements, the Defendant was obliged to pay the First Claimant 1,500,000 Tenge before 1st August 2023 and the Second Claimant 1,000,000 Tenge by the same date.

3. In bringing the present claim, the Claimants contend that the Defendant did not pay these sums. They also say that on 2nd August 2023 they emailed the Defendant requesting the overdue payment. It appears that no response was received.

4. The Defendant has not filed a Defence to the claim or otherwise engaged in these proceedings.

5. The Court is satisfied from the material provided that the Defendant was properly served with the claim.

6. Under Clause 5.2 of each Agreement, disputes arising out of the Agreements fall within the jurisdiction of the AIFC Court. The value of the claim places it within the remit of the AIFC Small Claims Court ("**SCC**").

7. The Claimants seek default judgment under Part 9 of the AIFC Court Rules, given the Defendant's failure to file a Defence. However, pursuant to Rule 28.7, Part 9 does not apply to proceedings before the SCC. Accordingly, the Court has proceeded to a final (non-default) judgment.

8. The Court accepts the Claimants' account of the relevant facts, noting that the Defendant has had ample opportunity to dispute them and has not done so.

9. The Claim is therefore allowed.

10. That leaves the question of costs. Both claimants seek their legal and notary costs associated with having to bring this claim. Under Rule 26.9(2) of the AIFC Court Rules, costs in SCC proceedings may only be awarded against a party who has acted unreasonably. It is well established that where a Defendant's complete lack of engagement leaves a Claimant with no choice but to bring proceedings before this Court, and where the Defendant then continues to fail to engage once proceedings have been commenced, that is likely to be treated as unreasonable conduct. See most recently Case 45 of 2023, ***Alaguzova v. Amantay***, at para. 22, and Case 41 of 2023, ***Aurora Minerals Group LLP v. APL Teksan Maden***, at paras. 13-14, and the earlier case-law cited therein. Applying the principles set out there, the Court concludes that in the circumstances of this case, both claimants are entitled to the full costs claimed.

By Order of the Court,

Charles Banner KC,
Justice, AIFC Small Claims Court

Representation:

The Claimants were represented by Ms. Yulia Davydova, Lawyer of the Karaganda Regional Bar Association, Karaganda region, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 May 2024

CASE No: AIFC-C/CA/2024/0002

FREEDOM FINANCE JSC

Appellant/Claimant

v

Mr. EGOR ROMANYUK

Respondent/Defendant

JUDGMENT

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

ORDER

The application for permission to appeal is refused.

JUDGMENT

1. This is an application for permission to appeal against the judgment of Justice Sir Rupert Jackson given on 22nd November 2023.

2. He found in favour of the Claimant in the sum of USD 100,000 plus costs.

3. The Claimant seeks permission to appeal. It says that the Judge ought to have awarded USD 5,000,000.

4. The judgment was the second delivered by the Judge, arising out an agreement between the parties (SRCA) and disparaging remarks made on social media by the Defendant about the Claimant and its Group.

5. The Judge made findings about the posts relied upon by the Claimant. He rejected the arguments that the terms of the SRCA prevented the Claimant from recovering damages. He also accepted that the relevant posts were disparaging within the terms of the agreement and thus that the Defendant was in breach.

6. This left what the Judge described as the third issue, namely to what remedy was the Claimant entitled. This is the issue which forms the basis of the application for permission to appeal.

7. The Judge referred to Article 297 and 351 of the Civil Code and to his own observations in his previous judgment about these provisions.

8. Article 297 gives the Court a discretion to reduce a penalty (fine, fee) if it would be "excessively large as compared to the losses to the creditor".

9. The Claimant says that by only awarding USD 100,000 the Judge was wrong because, in effect, he placed the burden of proving loss on the Claimant when it should have been on the Defendant. It is said that no evidence was adduced to support the lower figure and that the Claimant had been taken by surprise by the Judge's award, and was not able to advance the legal arguments as now set out in the grounds of appeal.

10. The Claimant also maintains that his argument is consistent with the Russian Civil Code, the UNIDROIT principles and common law case law.

11. In paragraphs 6.1 to 6.10 of his judgment, the Judge carefully considered all the arguments on both sides. This involved an assessment of the facts based on what he had learned from both cases. In my judgment, he directed himself, in the light of all the relevant considerations and he recorded the rival contentions.

12. In the final analysis, he had a discretion, as set out above, and I do not consider that an appeal has real prospects of success (Rule 29.6(1) of the AIFC Court Rules).

13. I interpret the Claimant as also relying on Rule 29.6(2) of the AIFC Court Rules in that it is said that the judgment creates a "wrong precedent" for the application of Article 297, and that this provides a "compelling reason" to grant permission to appeal. In my judgment it was an application of the Code to the facts of a particular case, and the judgment does not create a precedent which would prevent a Court coming to a different conclusion in a different factual scenario.

14. In these circumstances, I refuse permission to appeal.

By the Court,

The Rt. Hon. The Lord Faulks KC

Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Smbat Alikhanyan, "Assistent Plus" International Law Firm, Moscow, Russian Federation.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 May 2024

CASE No: AIFC-C/CFI/2024/0001

AQUA FACTORIA LLP

Claimant

v.

AOM SDF I B.V. PRIVATE LIMITED COMPANY

Defendant

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

ORDER

UPON the Claimant's claim (1) for an order setting aside the Order of Justice Lord Faulks KC dated 14 November 2023; (2) for an order setting aside an arbitration award dated 18 October 2023; and (3) for an order determining the counterclaim in the arbitration;

AND UPON the Claimant's application for an extension of time to apply for an order setting aside the Order of Justice Lord Faulks KC dated 14 November 2023;

AND UPON hearing counsel for the parties;

IT IS ORDERED THAT:

1. **The Claimant's application for an extension of time to apply to set aside the Order of Justice Lord Faulks KC of 14 November 2023 is extended to 15 January 2024.**

2. **The Claimant's claim is dismissed.**

3. **The parties shall file submissions on costs and any consequential matters by 18:00 Astana time on 29 May 2024.**

JUDGMENT

A. Introduction

1. By this claim, the Claimant seeks to set aside an arbitration award dated 18 October 2023 ("**the Award**") issued under the Rules of the International Arbitration Centre of the AIFC. The Claimant's central complaint is that the arbitrator decided the claim on the basis of a case which was not advanced or argued.

2. The underlying claim arises out of an agreement ("**the Agreement**") pursuant to which the Defendant advanced loan monies to the Claimant. The Claimant repaid the principal sum, but refused to pay any interest, prompting a claim by the Defendant. The Claimant counterclaimed in the arbitration for termination of the Agreement.

3. By the Award, the arbitrator awarded the Defendant a total of KZT 242,784,174.28, together with the arbitrator's fee of KZT 500,000. According to the Claimant, in doing so, the arbitrator relied on a finding that the parties had agreed to reduce the amount of the loan advanced. That, the Claimant says, was not the Defendant's case before the arbitrator. The arbitrator also dismissed the counterclaim.

4. The Claimant seeks to set aside the Award on the basis that it contains decisions on matters beyond the scope of the submission to arbitration, within the meaning of Article 44(2)(a)(iii) of the AIFC Arbitration Regulations. In addition, the Claimant makes certain other criticisms of the Award. The Claimant also asks this Court to determine the arbitration counterclaim in its favour and issue an order terminating the Agreement.

5. The Defendant resists the claim. The claim is, according to the Defendant, in reality an attack on the merits of the Award.

B. **Background**

6. On 15 December 2020, the Claimant and the Defendant entered into the Agreement.

7. The Agreement contained the following terms:

> 1.1…
> "**Interest**" means Loan Interest in the amount specified in Article 4 of the Agreement;
>
> "**Repayment Schedule**" means the frequency of repayment of the next part of the Loan and Interest in accordance with Annex No. 1, which is an integral part of this Agreement;
>
> "**Default**" means the occurrence of any of the cases listed in Article 10 of this Agreement;
> …
> "**Loan**" means financial (credit) resources in the form of cash provided by the Lender to the Borrower on the terms defined by this Agreement.
> …
> "**Loan Amount**" means money in the amount of 2,717,964,854… tenge provided to the Borrower in accordance with this Agreement.
>
> "**Borrower's Account**" means the Borrower's bank account for transferring the Loan Amount to a second-tier bank, the details of which are specified in paragraph 3.2 of this Agreement.
> …
>
> 2.1. The Lender shall transfer money to the Borrower for the following purposes:
> 1) Capital expenditures;
> 2) Making up current assets.
>
> 2.2. The total amount of the loan in the amount of 2,717,964,854… tenge shall be provided for the Loan maturity, and the Borrower shall undertake to repay the Loan and the Interest due on time, in the manner and on the terms provided for in this Agreement and the Repayment Schedule according to Annex No. 1 to this Agreement.
> …
>
> 3.1. The Loan amount shall be provided to the Borrower within 15 (fifteen) working days from the date of fulfillment by the Borrower and the Pledgor of the conditions provided for in paragraph 3.4 of the Agreement.
>
> 3.4. The Lender's obligation to provide a Loan shall arise only after the Borrower and the Pledgor fulfill the following conditions…
> …
> 3.6. The period of use of the Loan shall begin from the date of receipt of the Loan Amount to the Borrower's Account and end with the date of receipt of the entire Loan amount and Interest under this Agreement in favor of the Lender.
>
> 4.1. The Borrower shall pay the Lender the Interest according to the Repayment Schedule specified in Annex No. 1 to this Agreement. Interest shall be calculated at the rate of 8%... per annum (without capitalization).
>
> 4.2. Interest shall be accrued on the Loan amount (principal amount) actually used by the Borrower based on the number of dates of its use…

4.3. Payment by the Borrower of the Interest shall be made in tenge according to the Repayment Schedule by transfer to the Lender's Account…

…

4.5. Accrual of the Interest shall be terminated from the day following the day on which the Borrower fully fulfills their obligations to repay the Loan (including in case of early repayment of the Loan).

…

5.12. If the Borrower fails to fulfill the conditions specified in paragraph 3.4 of this Agreement within 10 (ten) calendar days from the date of conclusion of the Agreement, the Lender shall have the right to refuse further performance of this Agreement and this Agreement may be terminated unilaterally, out of court by sending a written notice to the Borrower.

…

6.1. The Borrower shall be obliged to repay the principal amount of the Loan, accrued Interest and other amounts payable in accordance with this Agreement in full and within the terms stipulated by the Repayment Schedule. The repayment schedule shall be signed by the Parties on the day the Loan is issued.

…

8.1. The Borrower shall assume obligations to the Lender:

…

8.1.11) to make an early repayment of the Loan received together with the Interest due in case of Default;

…

10.1. Borrower's Default shall be recognized as non-fulfillment or improper fulfillment by the Borrower of the following obligations under this Agreement, the Collateral Arrangement;

…

10.1.9) violation of conditions stipulated in subparagraphs 8.1.6)-8.1.8), 8.1.10) of Article 8, paragraphs 5.3., 5.8., 5.9., 6.1. of this Agreement, subparagraphs 2.2.1.-2.2.3, 2.2.6., 2.2.9., paragraphs 3.1.-3.6. of the Pledge Agreement for the real estate specified in 2.2.15., - 2.2.15, 2.2.17, paragraphs 3.1.-3.5. of the Pledge Agreement for movable property specified in subparagraph 5.1.2. of this Agreement;

…

10.2. In case of Default, the Lender shall have the right to apply the following Measures at their discretion:

10.2.1) prematurely charge the full amount of the Loan, including accrued Interest and other amounts due in accordance with the terms and conditions of this Agreement;

8. Clause 14.2 contained an arbitration agreement in favour of the International Arbitration Centre of the AIFC ("**the IAC**").

9. It is common ground that at least one of the conditions under Clause 2.4 of the Agreement was not satisfied by the Claimant. Despite this, on 29 December 2020, the Defendant transferred the sum of KZT 1,670,000,000 into the account designated as the Borrower's Account in clause 3.2 of the Agreement. Thereafter, on 15 January 2021, the parties both signed a version of Appendix 1 to the Agreement ("**the Appendix**") which recorded the principal amount of the Loan as up to KZT 1,670,000,000.

10. From that date forwards, the Claimant earned interest on the Loan monies at the rate of 4% per annum.

11. In the event, the Claimant was never able to fulfil the conditions of the Loan. Eventually, on 4 January 2023, the principal was repaid to the Defendant. The Claimant kept the interest which had been earned.

12. On 28 April 2023, the Defendant submitted a Request for Arbitration to the IAC. The Defendant

claimed interest on the loaned amount for the period it had been advanced in the total sum of KZT 242,784,174.28. An arbitrator was appointed and statements of case were exchanged. The Claimant counterclaimed for an order terminating the Agreement and claiming costs. A hearing took place on 28 July 2023 and further written submissions were subsequently exchanged. On 18 October 2023, the arbitrator issued the Award.

13. In the Award, the arbitrator found that, by signing the Appendix, the parties had agreed to reduce the amount of the loan which had been initially agreed. As a result, the Defendant had fulfilled its obligations under the Agreement by transferring the sum of KZT 1,670,000,000 to the Claimant on 29 December 2020. The arbitrator found that the term of the loan ran from the date the funds were sent to the Claimant's account.

14. The arbitrator referred to clause 10.2 of the Agreement, which provided, at 10.2.1 that, in the event of default, the Defendant was entitled to accelerate the Loan and accrued interest. He found that the Claimant had been in default, in that clause 3.4.10 had not been complied with, by the Claimant's own admission. That amounted to a default by operation of clause 10.1.9 of the Agreement.

15. By clause 4.2 of the Agreement, interest was calculated "*on the amount of the Loan actually used by the Borrower*". The arbitrator resolved a dispute about whether, during the initial 36 month grace period, interest accrued but was deferred or whether it did not accrue at all. He noted that the interest provided for in Appendix 1 was only consistent with the contractual interest rate if it accrued but was deferred.

16. As a result, the arbitrator awarded the Defendant KZT 242,784,174.28. The arbitrator went on to dismiss the counterclaim for termination of the Agreement.

17. On 30 October 2023, the Defendant applied to the Astana City Court for recognition and enforcement of the Award. A hearing took place on 8 November 2023 and the Court's decision was that the Defendant should approach this Court.

18. On 14 November 2023, the Defendant obtained an Order from this Court recognising and enforcing the Award and directing the Claimant to pay the sums awarded ("**the Enforcement Order**"). In the usual way, the Enforcement Order was sought and obtained without giving notice to the Claimant. The Claimant was permitted to apply to set the Order aside. The time for doing so was however abridged from the default 14 days provided for in the AIFC Court Rules to 7 days.

19. The Claimant received a copy of the Enforcement Order on 15 November 2023. On 20 November 2023, the Claimant's lawyers submitted a document to the AIFC Court asking for it to be set aside. In that document, they complained that they had not been served with the application for the Enforcement Order. That is a misunderstanding of the procedure. Common with many common law jurisdictions, the AIFC Court permits applications for the recognition and enforcement of arbitration awards to be made without notice. The Order obtained is subject to any application made by the respondent to set it aside and may not be enforced in the interim.

20. The Claimant further complained that it was not open to the Court to recognise and enforce an arbitration award during the period in which it remains open to the Respondent to apply to set aside the Award – in this jurisdiction, 3 months. That is also wrong and the point was not pressed at the hearing before me.

21. The balance of the Clamiant's letter raised the issues which are raised in this claim. In particular, it was argued that (a) the arbitrator had wrongly found that the parties had agreed to reduce the loan, when the Defendant had not taken that position and (b) the arbitrator had found that certain provisions of the Agreement and the Appendix were ambiguous, such that they should have been construed against the Defendant.

22. The Defendant's document of 20 November 2023 was not in the form of an application notice. I further understand that it was not translated into English. Only some of the accompanying documents were sent to the Court and none were translated. The Claimant described the document as a "draft petition".

23. On 21 November 2023, the Claimant sent what it described as a "draft statement of claim" to this Court seeking to set aside both the Enforcement Order and the Award.

24. On 6 December 2023, the Court issued an execution order in respect of the Enforcement Order.

25. Eventually, on 15 January 2024, the Claimant submitted this claim. In it, the Claimant seeks an order:

    a. Cancelling the Enforcement Order;

    b. Setting aside the Award; and

    c. Settling the Claimant's counterclaim in the arbitration by terminating the Agreement.

26. The Claimant's central complaint is that the arbitrator wrongly decided that, in signing the Appendix, the parties had agreed to reduce the loan sum. In fact, the Defendant had argued that it had advanced only part of the loan sum and intended to advance the rest, once the Claimant complied with the outstanding conditions in the Agreement. As a result, the Claimant says, the Award contained decisions on matters which were beyond the scope of the submission to arbitration. The Claimant further notes that the arbitrator found that the Appendix and the Agreement were ambiguous as to whether interest accrued in the grace period. As a result, the Claimant says, the arbitrator should have found that no interest was due. Amongst the points raised, the Claimant says that, for the loan to be "used" it needed to be applied for its intended purpose. It was not as it was held in an escrow account.

27. The Defendant resists the claim. As a threshold point, the Defendant says that the Claimant's claim comes long after the deadline imposed in the Enforcement Order, which expired on 21 November 2023. The Defendant further contends that the Claimant's case is simply an invitation to review the merits of the Award, which is not permissible.

28. At the hearing, the Claimant sought an extension of time, in the event that one was required.

C. **Extension of time**

29. It is obviously unsatisfactory that the Claimant failed properly to apply to set aside the Enforcement Order between 21 November 2023 and 15 January 2024, a period of 8 weeks. Despite that, I am willing to extend time.

30. First, I note that the time for applying to set aside the Enforcement Order was abridged from the default 14 days provided for by the Rules. That is of course well within the discretion of the Court. However, it is likely to place additional pressure on a party who is not familiar with the procedures of this Court.

31. Second, and most significantly, the Claimant set out the substance of its claim in documents which were submitted to the Court within the deadline. This is significant because it demonstrates that the Claimant was not deliberately flouting the rules and that there is limited prejudice to the Defendant as a result of the delay.

32. Third, I asked the Defendant's counsel whether he could identify any prejudice which had been

suffered by the Defendant. He was unable to do so.

33. Fourth, as the Claimant has pointed out, the statutory time limit for applying to set aside an award is 3 months. That claim was brought within time. If that claim is successful, it would be necessary to unwind the Enforcement Order one way or another.

34. None of this is an invitation to parties to miss Court deadlines. Nor is it an indication that parties can effectively ignore orders recognising and enforcing awards, if they intend to apply to set them aside. There would be likely to be costs consequences if they did so. Nor could a party who took that course complain if they were the subject of invasive execution measures while their set aside claim was being considered. In the circumstances of this case, it likely makes little practical difference. However, in case it does, I am willing to extend time.

D. **Set aside and enforcement – relevant law**

35. The Court may set aside or refuse enforcement of an arbitration award only if one of the grounds set out in the AIFC Arbitration Regulations is satisfied. Those grounds are set out in Article 44 (set aside) and Article 47 (enforcement).

36. In approaching this claim, I remind myself that Kazakhstan has acceded to the New York Convention and, in its AIFC legislation, has adopted an approach based on the UNCITRAL Model Law. In such jurisdictions, the Courts tend to show a strong "*pro-enforcement bias*". I also remind myself that the Court is not entitled, when considering an application of this sort, to review the merits of the award. Nor should it impose unrealistic standards on arbitrators or expect them to refer to every piece of evidence or argument relied on. The burden is on the Claimant to establish that the ground relied on is made out.

37. The particular ground relied on by the Claimant is set out in Article 44(1)(2)(a)(iii) and Article 47(1)(a)(iii) in materially identical terms:

> *"the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside"*

38. I would normally understand this ground to be concerned with whether the claims which are the subject of the award were submitted to the arbitrator or were within the scope of the arbitration agreement. Where a party alleges that an award was decided by reference to a "*surprise point*", it might better be advanced under grounds (ii) ("*the party… was… unable to present his case*") or (iv) ("*the arbitral procedure was not in accordance with the agreement of the parties*"). Whichever provision is relied on, however, it would be necessary to show that the introduction of a "*surprise point*" led to real unfairness and affected (or, at least, could well have affected) the outcome. An unheralded observation by a tribunal on a point which was entirely irrelevant to its decision could not be a ground to set aside an award.

E. **The application**

39. The Claimant argues that the case was decided on the basis of a surprise point because the arbitrator found that, by signing the Appendix, the parties were agreeing to reduce the loan amount: Award, paragraph 76. In fact, the Claimant points out, that was not the Defendant's case.

40. In its submission of 3 August 2023, the Defendant said "*the [Defendant] transferred a portion of the loan amount… This transfer was done proportionally to the fulfilled conditions of paragraph 3.4.2…*

The remaining part of the loan amount was supposed to be transferred by the [Defendant] after the complete replenishment of the necessary amount of the [Claimant's] own funds into its statutory capital and the fulfillment of other conditions stipulated in the Loan Agreement."

41. According to the Claimant, then, the arbitrator has adopted a factual position which neither party contended for. This was significant, the Claimant says, for two reasons. First, interest did not run *at all* until the entire loan sum was deposited. Second, interest could only be reclaimed in the event of a default.

42. In response, the Defendant's position is that, while there is a difference in the way in which the claim was expressed and the way in which the arbitrator described his conclusions, the difference was not material. What mattered was that the parties had agreed that only the sum of KZT 1.67bn would be advanced at that time and had agreed to the terms of the Appendix.

43. According to the Defendant, interest accrued whether or not the entire loan was advanced. This was because the parties had agreed to the terms in the Appendix and, in any event, interest was expressly payable on acceleration following default. There was already a default, even before any money was advanced.

44. I agree with the Defendant.

45. For the purposes of the dispute before the arbitrator, I can see no material difference between (a) the parties agreeing that the loan sum would be reduced and (b) the parties agreeing that only part of the loan would be advanced at that time. The central issues before the arbitrator were whether interest accrued during the initial grace period and whether it was payable in the circumstances of the case.

46. What mattered for those purposes, as the Defendant says, is that the parties agreed to the terms of the Appendix.

47. At paragraph 93 of the Award, the arbitrator noted the Defendant's case that, by signing the Appendix, the parties agreed that interest on the loan amount accrued at 8% per year, including during the grace period. At paragraph 96, the arbitrator agreed with this position. He explained that, while the terms of the Appendix and the Agreement were ambiguous, that was implicit in the calculation of interest due after the grace period. Had the parties agreed that interest did not accrue, the repayments after the grace period would have been reduced, given the interest rate which was applied. That is a conclusion which was argued between the parties and was open to the arbitrator. It is not one which this court could review, even if there was any reason to doubt its logic.

48. Further, as the arbitrator pointed out at paragraph 82 of the Award, the Defendant was entitled, in the event of default, to accelerate the loan "*including the accrued Remuneration*". At paragraph 85, the arbitrator noted that the Claimant did not deny that it had failed to comply with clause 3.4.10. That, the arbitrator found, amounted to an event of default, which entitled the Defendant to recover interest. Again – there is no reason to interfere with those findings.

49. In oral submissions, the Claimant's counsel challenged these findings. She argued that clause 3.4.10 was not a precondition. It needed to be complied with after the loan was advanced. That is not what the Agreement says. However, even if correct, that could only ever amount to an error which it is not open to this court to correct.

50. The Claimant also submitted that, on a true construction of the Agreement, interest did not run until the full sum was paid. The argument was put in various ways in the claim form, by reference to the terms of the Agreement and, in particular, the formal requirements for its amendment. Again, this point is simply an assertion that the arbitrator was wrong in finding that, on his view of the

Agreement and the Appendix, interest ran from the date of payment of KZT 1.67bn.

51. Similarly, the Claimant complained that, in paragraph 95 of the Award, the arbitrator had found that the terms of the Agreement and the Appendix were not "*unambiguous*" as to whether interest accrued during the grace period. According to the Claimant, in light of that, the arbitrator should have concluded that no interest was due in the grace period. There is no merit in this. The fact that a contract is not clear does not mean it cannot be interpreted. The issue of its interpretation was squarely before the arbitrator and the parties are bound by his decision.

52. The Claimant also advanced various reasons why it said that the loan monies had not been "*used*" so as to attract interest. However, the arbitrator concluded that the monies had been used and in any event, interest was due. That decision is, with respect, totally unsurprising and was plainly open to the arbitrator on the arguments before him.

53. In the result, while I accept that there is a difference between the way in which the claim was articulated and the way in which the arbitrator expressed himself, I do not consider that it was material. I do not accept that the decision was beyond the scope of the submission to arbitration. Nor, had it been put in those terms, would I have accepted that the Claimant was unable to present its case as a result, nor that the arbitration procedure was otherwise than in accordance with the parties' agreement.

54. I therefore reject the claim.

55. In those circumstances, the Claimant's claim for a fresh determination of the counterclaim does not arise. However, even if I had been minded to set aside the Award, that is not a remedy I could have granted. The Court's powers in respect of arbitrations are strictly confined by the terms of the AIFC Arbitration Regulations. In matters governed by those Regulations, the Court may not intervene, except to the extent provided for in the Regulations: Regulation 13.

56. In the light of my decision, my preliminary view is that costs would be likely to follow the event. However, I have not heard from the parties on this. I will therefore allow them a short period in which to agree an order as to costs, failing which they should file and exchange brief submissions limited to no more than 5 pages and I will decide the issue on paper. The costs submission should include costs schedules from the party (or parties) claiming to be entitled to costs.

By Order of the Court,

Justice Tom Montagu-Smith KC
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Zhanar Kenbeilova, Legal representative, Astana, Kazakhstan.

The Defendant was represented by Mr. Kanat Mukanov, Lawyer, AOM SDF I B.V. Private Limited Company, Astana, Kazakhstan.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

15 February 2024

CASE No: AIFC-C/SCC/2023/0045

Ms. Assemgul Alaguzova

Claimant

v

Mr. Bagazat Amantay

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner KC

ORDER

1. **The Claim is allowed.**

2. **The Defendant shall pay the Claimant 7,348,445 Tenge (comprised of contractual damages of 6,700,000 Tenge, together with a penalty of 240,945 Tenge and costs of 437,500 Tenge) within 14 days of this Order.**

JUDGMENT

1. The Claimant brings this claim pursuant to an agreement ("**the Agreement**") dated 22nd June 2023 which she agreed with the Defendant following a mediation.

2. Clause 1 of the Agreement required the Claimant to transfer a Lexus LS460 car, registration 686AIG01 ("**the Car**"), to the Defendant on the day that the Agreement was signed (i.e. 22nd June 2023), *"with the terms of the subsequent redemption in the following order:"*. There followed subclause (a), which required the Defendant to transfer 3,000,000 Tenge to the Claimant on 30th June 2023, and subclause (b), which required the Defendant to transfer a further 3,500,000 Tenge to the Claimant by 25th January 2024, failing which the transfer of 3,000,000 Tenge under subclause(a) was to be considered irrecoverable.

3. Clause 2 of the Agreement required the Defendant to transfer 20,000 per day to the Claimant in the interim period between the date of the Agreement (22nd June 2023) and the date on which the obligation under Clause 1(a) arose (30th June 2023).

4. Clause 3 provided that that Car should, by 10th February 2024, be re-registered into the Defendant's name following the Defendant's payment of the 6,600,000 Tenge to the Claimant pursuant to Clause 1.

5. Clause 4 provided that if the Car was not re-registered to the Defendant's name as provided for by Clause 3 by 10th February 2024, then the Claimant should pay back the 6,600,000 Tenge to the Defendant.

6. Clause 7 provided that any dispute arising out of or in connection with the Agreement shall be subject to the exclusive jurisdiction of the AIFC Court.

7. The Claimant says that she transferred the Car to the Defendant on 22nd June 2023 in accordance with the Agreement, but the Defendant has not paid any of the monies due under Clause 1(a), Clause 1(b) or Clause 2.

8. She seeks an order from the Court:

    a. Requiring the Defendant to transfer the Car back to the Claimant;

    b. Paying a penalty in the amount of 240,945 Tenge under Article 353 of the Civil Code of the Republic of Kazakhstan ("the Civil Code"); and

c. the costs of these proceedings, comprised of 32,500 Tenge court fee,[1] 350,000 Tenge for legal representation and 55,000 Tenge for the costs of translating the documents put before the Court.

9. The Defendant did not file a defence within the time prescribed by the AIFC Court Rules or at all.

10. The value of the claim makes it a small claim within the jurisdiction of the AIFC Small Claims Court (**"SCC**") under Part 28 of the AIFC Court Rules.

11. The Court initially made directions giving the opportunity to the Claimant to elaborate the legal basis on which she contended the Court had power to order the Defendant to transfer the car to her, and giving the Defendant the opportunity to comment on that elaboration. The Claimant took up the opportunity to provide further submissions in elaboration. The Defendant did not take up the opportunity to respond.

12. The Court then listed a hearing to take place on 30th January 2024, to explore further the legal basis of the remedy sought by the Claimant. The Claimant was ably represented by Ms Assiya Ibragimova. The Defendant did not attend.

13. The Court was told that the Defendant has been served at all stages with the papers in and directions in this claim, using the address given for him on the Agreement. He has not notified the Claimant or the Court of any change from that address.

14. The Court is satisfied that that the Defendant has had more than ample opportunity to respond to this claim.

15. The Court accepts the Claimant's account of the facts as set out at para. 7 above.

16. When asked by the Court at the hearing why the Claimant was seeking an order requiring the return of the car, rather than the payment of the sums due under the Agreement, Ms Ibragimova explained that the Defendant was thought to be in financial difficulties with multiple debtors, and therefore might not currently be good for the money.

17. The Court has considerable sympathy with the Claimant's situation, and deprecates the Defendant's conduct both in flagrantly breaching his contractual obligations and thereafter completely failing to engage in these proceedings.

18. After careful reflection, however, the Court does not consider that an order requiring the return of the car is a remedy available to the Claimant in these proceedings. The Defendant's obligations under the Agreement are financial.

19. The Court is prepared to treat the Claimant's claim as incorporating in the alternative the remedy of an order that the Defendant pay the 6,500,000 Tenge due under Clause 1(a)-(b), as well as the 200,000 Tenge due under Clause 2. These sums should have been paid but have not been. If the Court were simply to dismiss the Claimant's request for an order requiring the return of the car, on the basis that only a remedy in damages is available, without going on to make an order for

[1] The breakdown of the costs in the Claim Form gives the Court fee as 32,500 Tenge. The Court is informed by the Registry that the fee was in fact 45,000 Tenge. Be that as it may, it is not appropriate – particularly given the Defendant's non-participation in the proceedings – to award the Claimant a greater amount of costs than is claimed.

such damages, the Defendant would benefit from its breach of contract and non-engagement in these proceedings. That would be contrary to the Overriding Objective in Part 1 of the AIFC Court Rules.

20. Turning next to the penalty claimed under Article 353 of the Civil Code, the relevant part of provision states:

> "For improper use of other people's money as a result of failure to fulfil a monetary obligation or delay in their payment, or their unreasonable receipt or savings at the expense of another person, a penalty shall be payable. The amount of the penalty shall be calculated based on the base rate of the National Bank of the Republic of Kazakhstan on the day of execution of the monetary obligation or its corresponding part. When collecting the debt in court, the court may satisfy the creditor's demand based on the base rate of the National Bank of the Republic of Kazakhstan on the day of the claim or on the day of the decision, or on the day of the actual payment at the choice of the creditor. These rules shall apply if a different amount of penalty is not established by legislative acts or agreement."

21. The Defendant's breach of contract on its face amounts to a "delay in [the Claimant's] payment." There is therefore a prima facie basis to award the Claimant the penalty sum that she claims under Article 353. The Defendant has not contested this either in principle or in relation to the amount of the penalty claimed (240,945 Tenge). This aspect of the claim is therefore allowed.

22. Finally, there is the issue of costs. Under Rule 26.9(2) of the AIFC Court Rules, costs in SCC proceedings may only be awarded against a party who has acted unreasonably. It is well established that where a Defendant's complete lack of engagement leaves a Claimant with no choice but to bring proceedings before this Court, and where the Defendant then continues to fail to engage once proceedings have been commenced, that is likely to be treated as unreasonable conduct. See most recently Case 41 of 2023, ***Aurora Minerals Group LLP v. APL Teksan Maden*** (17th January 2024), at paras. 13-14, and the earlier case-law cited therein. Applying the principles set out there, the Court has no hesitation in concluding that the Defendant in this case has acted unreasonably, and therefore the Claimant's application for costs is allowed in the sum claimed of 437,500 Tenge.

23. The Defendant shall pay these sums to the Claimant within 14 days of this judgment and the accompanying Order.

By Order of the Court,

Charles Banner KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ibragimova Assiya, "VETO" Legal Center" LLP, Astana, Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

19 September 2024

CASE No: AIFC-C/CFI/2023/0044

JSC NATIONAL COMPANY QAZAVTOJOL

Claimant

v

SINOHYDRO CORPORATION LIMITED

Defendant

JUDGMENT AND ORDER

Justice of the Court:
Justice Tom Montagu-Smith KC

ORDER

UPON the Claimant's claim disputing the decisions ("the Decisions") of a disputes board and engineer pursuant to a construction contract.

AND UPON the Court ordering payment of sums found to be due pursuant to the Decisions and the Claimant making that payment.

AND UPON the Court directing a hearing of the issue of whether it is open to the Claimant to challenge the Decisions and reclaim the payment.

AND UPON hearing counsel for the parties.

IT IS ORDERED THAT:

1. The Claimant is entitled to challenge the Decisions and to claim repayment of sums paid pursuant to the Decisions.
2. The Defendant shall by 18:00 Astana time on 2 October 2024 provide to the Claimant copies of all appendices to the 5 claim reports filed with the Defence.
3. By 18:00 Astana time on 16 October 2024, the parties shall discuss between themselves and seek to agree the directions required to prepare the case for trial. Where no agreement can be reached, the parties should file their competing proposals with the Court. The parties shall in particular consider and discuss the following:
    1) Preparation of schedules setting out in detail the issues in dispute between the parties and their corresponding positions.
    2) Production of documents.
    3) Witness evidence.
    4) Expert evidence.
    5) The time needed for trial.
4. Any submissions on costs should be made by 18:00 Astana time on 25 September 2024.

JUDGMENT

A. Introduction

1. On 11 July 2017, the parties entered into a construction contract on FIDIC Red Book terms for the works on a stretch of road. The Claimant was the employer and the Defendant was the contractor.

2. Clause 20 of the contract provided for the resolution of disputes between the parties. By clause 20.1 of the General Conditions, any claim was to be submitted to the engineer for their decision. By clause 20.4, such decisions and any other disputes could be referred to a disputes board for review. Subject to certain contractual limitations, such decisions could then be referred to arbitration by either party.

3. Disputes arose between the parties. A disputes board was appointed on 1 March 2022. The Defendant submitted 5 claims in which it sought an extension of time of 654 days and total compensation of KZT 7,512,666,000.

4. The disputes board issued its decision on 24 March 2022. This was followed by a decision of the engineer on 1 August 2022. By these decisions, the Defendant was granted an extension of time of approximately 380 days and a total compensation of KZT 2,827,132.994.20. Slightly different periods and sums have been alleged in these proceedings. However, for present purposes, the precise calculations do not matter.

5. The Claimant was dissatisfied with the decisions. On 23 December 2022, the parties entered into Addendum No. 3, by which they agreed to vary the contract.

6. Amongst the amendments, the parties agreed to refer their disputes to the AIFC Court, rather than to arbitration.

7. Article 2 provided (in translation):

> "The Parties agreed that the [Claimant] will temporarily make a payment in the amount of 2,827,132,994.20 KZT to a special escrow account and extend the Contract period for 380 days from the date of signing this supplementary agreement No. 3 by the decision of the SUS, which is mandatory in accordance with clause 20.4 of the GCC, but the Employer will apply to the court on the issue disagreement with the decision of the DAB on the amount of compensation and the Contract extension period:
>
> - At the same time, if the decision is made in the direction of the Employer, the Contractor undertakes to reimburse the amount of compensation in full within 84 days after the official court decision is made.
>
> - At the same time, if the decision is made in the direction of the Contractor, the Employer does not claim a refund of the funds paid and the application of penalties for this project to the Contractor."

8. The Claimant made part, but not all, of the payment. As a result, the Defendant brought a claim for the balance. By an Order dated 17 May 2023, the then Chief Justice, Lord Mance, ordered the Claimant to pay the balance.

9. The Chief Justice described the effect of the addendum as follows (at paragraph 5):

> "The scheme was that there would be an immediate temporary payment, what one would call a provisional payment, but that the Employer would not lose the Employer's right to

> investigate the substance of the decisions reached by the DAAB and by the Engineer but could challenge them in this Court."

10. At paragraph 9, the Chief Justice said:

> "In those circumstances, I will direct that the Court enters judgment against the Defendant for the figure of 2,203,244,303.13 KZT. That would of course leave the Defendant free under Supplementary Agreement No. 3 to bring any challenge or claim which it wishes in any way it can."

11. The Claimant issued the present proceedings on 14 November 2023. The Defendant has filed a Defence. The Court issued directions, requiring the parties to confer and seek to agree directions for the claim to trial. No assistance was forthcoming and so the Court listed a case management conference, which took place on 17 April 2024.

12. At the case management conference, the Defendant stated that it took a preliminary objection to the claim. According to the Defendant, the Claimant was not entitled to challenge the decisions of the engineer or the disputes board, relying on 3 factors:

    1) The decision of the Chief Justice;

    2) The terms of the contract;

    3) A limitation period.

13. For reasons I set out in a prior judgment, I directed the hearing of those defences as preliminary issues. The parties exchanged submissions in May. Unfortunately, the parties did not have mutual availability until 16 September 2024.

14. At the hearing, the Defendant's counsel identified various grounds on the basis of which she claimed that the Claimant was barred from challenging the decisions. While some of the submissions were not clear to me, so far as I can understand them, the Defendant's main arguments were the same as those raised at the case management conference. In addition, it was suggested that the Claimant had abandoned any right to challenge the decisions by continuing with the contract, making payments and permitting sums to be released from escrow.

15. It seems to me perfectly clear that the decision of the Chief Justice preserved the Claimant's right to challenge the decisions after payment. That appears in terms in the passages I have recited above.

16. It is right that the terms of the contract imposed strict times within which a decision of the engineer and the disputes board needed to be challenged. The Defendant relied in particular on Clause 20.4 of the General Conditions, which provided that any disagreement with a decision of the dispute board needed to be raised within 28 days of the decision, failing which it would become binding. The Defendant asserts that no notice of objection was received within the time period.

17. The Claimant's response is that, whatever the prior position, the contract was varied by Addendum No. 3. By clause 2 of that Addendum, the Defendant expressly agreed that the Claimant was entitled to apply to the Court to review the decisions.

18. The Defendant suggested that the Claimant should have made that application more quickly. However, no deadline was imposed by the Addendum. In those circumstances, the contract, as varied by Addendum No. 3 does not prohibit this claim either. To the contrary, it anticipates a claim like this one.

19. As to limitation, the Defendant's counsel asserted in argument that the claim was time barred because, under Kazakhstan law, a claim must be brought within 1 year. Counsel referred me to Article 180 of the Civil Code. On inspection, that provision deals only with when the limitation period begins to run.

20. In her response submissions, the Claimant's counsel did not dispute that the limitation period was relevant. However, she took me to Article 178 of the Kazakhstan Civil Code, which states the default position that the limitation period is 3 years. I was not shown anything to suggest that there was a different statutory limitation period for claims of this sort. The Claimant's position was would run from the date of payment, which took place in 2023. However, even if the limitation ran from the date of the disputes board decision, it would run from 23 May 2025. It is difficult to see how any earlier date could be arguable and none was suggested. In those circumstances, the claim cannot on any view be statute barred.

21. Finally, the Defendant argued that the Claimant had effectively agreed with the decisions in a number of ways. The Claimant had paid the sum directed in the decisions, had authorised the release of funds from escrow, had paid for the works and had accepted and taken over the works.

22. As the Claimant pointed out, these steps simply constituted the Claimant's performance of its obligations under the contract. The scheme of the contract is that the parties are obliged to comply with the decisions of the engineer and the disputes board even when they have been referred to arbitration (or, in this case, the Court). These sorts of arrangements are very common in construction contracts, to preserve the contractor's cash flow in the event of disputes. Compliance with those obligations cannot indicate acceptance of the disputed decisions, because the parties are obliged to comply, even while the dispute remains unresolved.

23. In the circumstances, in my judgment, the Claimant is entitled to bring this claim to challenge the decisions of the disputes board and the engineer and, if and to the extent that claim succeeds, to recover the money it has paid.

24. As set out above, I have previously asked the parties for some assistance in formulating the directions necessary to prepare this case for trial. As the claims are presently set out, it is not clear to me whether the resolution of the dispute will require input from expert witnesses, or whether the disputes are capable of resolution on the documents and by reference to the terms of the contract alone.

25. At the hearing, I asked the parties again for their assistance with directions. In response, the Claimant's counsel indicated that it is difficult for the Claimant to form a view at this stage, because it is missing certain documents which were submitted by the Defendant to substantiate its claims to the disputes board. Most significantly, the Defendant's claims were supported by 5 reports, which refer to appendices. Those appendices were not attached when produced in these proceedings and the Claimant says it has not received them. The Defendant says it has. Whatever the truth of that, the contents of those appendices appears to be important to the evaluation of these claims. They were identified by the Claimant as being critical to its understanding of the claims. The Defendant has them and can produce them. I will therefore order the Defendant to produce those documents within 14 days.

26. Thereafter, I will direct the parties (for a second time) to liaise and seek to agree directions. The Court is particularly reliant on parties to propose suitable directions. If they cannot be agreed, the parties should each file their competing proposals and the Court may convene a further case management conference if that proves necessary.

27. The parties are required to consider in particular 4 areas:

1) Preparation of schedules setting out in detail the issues in dispute between the parties and their corresponding positions. Preparation of schedules can assist where there are a large number of discrete issues which need to be addressed. Claimants will often prepare a schedule, leaving space for the defendant's response. The parties should consider whether this would assist and, if so, propose dates for their preparation by the Claimant and completion by the Defendant.

2) Production of documents. The usual approach would be for the parties to produce the documents on which they rely and then request from the other party specific documents or narrow categories of documents which they require the other party to produce. Subject to objections, those further documents should then be produced and the Court will then resolve any disputed objections. The parties should consider the steps they consider are required and the dates by which each step should be completed.

3) Witness evidence. Parties are encouraged to identify any individuals whom they intend to call to give evidence and propose dates for the exchange of statements.

4) Expert evidence. The parties should consider whether any technical issues arise which require the assistance of experts. If they do, the parties may be able to agree to the appointment of a single joint expert, to assist the Court.

5) Trial. The parties should consider how long they should be set aside for hearing the claim.

28. Once the parties' proposals are received, the Court will consider whether to make directions or to order another CMC.

29. I have not received any submissions on the costs of this element of the proceedings. If either party wishes to claim those costs, it should do so within 7 days.

By Order of the Court,

Justice Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ayim Kolzhanova, Chief Manager of the Department of Legal and Personnel Work of JSC "NC "QazAvtoZhol", Astana, Kazakhstan.

The First Defendant was represented by Ms. Irina Li, Director of the "Legal Company Assessor" LLP, Almaty, Kazakhstan.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 January 2024
CASE No: AIFC-C/CFI/2023/0043

"ASTANA MEDICAL UNIVERSITY" NON-PROFIT JSC

Appellant

v

"ADAM AND AHMAD MARKETING CONSULTING" COMPANY

Respondent

JUDGMENT

Justice of the Court:
Justice The Rt. Hon. The Lord Faulks KC

ORDER

The application for permission to appeal is refused.

JUDGMENT

1. This is an application for permission to appeal against a decision of Justice Tom Montagu -Smith, sitting in the Small Claims Court of the Astana International Financial Centre.

2. The Claim and Counterclaim arose out of a dispute between Astana Medical University (the University) and Adam and Ahmad Marketing Consulting (the Company) in relation to various sums said to be owing pursuant to a contract dated 19th May 2021.

3. In his judgment, dated 23rd October 2023, the judge found that, in accordance with its Counterclaim, the Company was owed various sums by the University amounting in total to US$ 66,935.87 and KZT 49,914.041

4. The judgment was based on the judge's assessment of the witnesses' oral evidence and by reference to the contract. Each side called three witnesses. It is notable that the University served witness statements, from two of its witnesses, very late. The oral evidence was clearly helpful in the judge's understanding of the circumstances in which the parties entered into the contract and those in which the University decided not to continue its relationship with the Company.

5. As the judge pointed out (at paragraph 17 of the judgment) there were, by the end of the case, relatively few issues of fact. The University's case was that the Company had not fulfilled its obligations under the contract. The judge dealt carefully and comprehensively with each of the allegations made by the University (see paragraphs 85-94 of the judgment). He rejected all of their arguments.

6. The reality was that this was intended to be a long term relationship but that new management at the University decided that the Company was not giving value, and therefore wanted to end the relationship. The judge clearly concluded that this decision did not relieve the University of its obligations to pay the company in accordance with the contract.

7. I have considered the submissions made by both parties in relation to this application and have concluded that there is no realistic chance of the Claimant succeeding in its appeal. This was a decision on the facts and significantly based on an assessment of witnesses, who gave oral evidence. Nor do I consider that there is any other compelling reason why an appeal should be heard. In those circumstances I refuse the application for permission to appeal and dismiss the accompanying application to suspend the order for payment in accordance with the judgment.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC
Justice, AIFC Court

Representation:

The Appellant was represented by Mr. Serik Kuzhamkulov, advocate, Astana Advocates' Bar Association, Astana, Republic of Kazakhstan.

The Respondent was represented by Ms. Ardak Khabiyeva, legal adviser, member of the "Adilzanger" Chamber of Legal Advisers, Astana, Republic of Kazakhstan.

IN THE SMALL CLAIMS COURT
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

1 February 2024
CASE No: AIFC-C/SCC/2023/0042

MR SARINOV AYAN TOLEUOVICH

Claimant

v

(1) KHAN TENGRI CAPITAL LLP
(2) APEX MANAGEMENT GP LTD

Defendants

JUDGMENT AND ORDER

Justice of the Court:

Justice Saima Hanif KC

ORDER

1. **The Claim is allowed against the First Defendant to the extent that the First Defendant shall pay to the Claimant the sum of KZT 6,702,415.77 by no later than Friday 9 February 2024.**
2. **In all other respects the Claim against the First Defendant is dismissed.**
3. **The Claim against the Second Defendant is dismissed.**
4. **As long as the First Defendant complies with paragraph 1 of this Order, no order as to costs.**

JUDGMENT

Introduction

1. By a claim registered on 10 November 2023, the Claimant seeks various remedies from the AIFC Small Claims Court arising out of (1) a written contract of employment with the First Defendant and (2) what is said to be an implied contract of employment with the Second Defendant.

2. The parties accept that the claim is within the jurisdiction of the AIFC Court pursuant to Regulation 4(3) of the AIFC Employment Regulations No. 4 of 2017 (as amended) (henceforth the "**AIFC Employment Regulations**"), and that is appropriate for determination by the Small Claims Court ("**SCC**") having regard to Rule 28.2 of the AIFC Court Rules ("**the Court Rules**").

3. The parties have not requested a hearing. Both parties provided written submissions setting out their respective positions in detail, as contained in the Claimant's application form, a defence filed on behalf both Defendants, the Claimant's response to defence and a final submission from both Defendants in reply. The submissions were supported as appropriate by documentary evidence. In light of this, and bearing in mind the need for proportionality, I am able to decide this matter on the papers.

The Parties

4. The Claimant is Mr Sarinov Ayan Toleuovich.

5. The First Defendant is a limited liability partnership incorporated on 14 July 2022 in the Astana International Financial Centre.

6. The Second Defendant is a private company limited by shares, incorporated on 8 September 2023 in the Astana International Financial Centre. It obtained a licence from the Astana Financial Services Authority ("**AFSA**") on 10 October 2023.

7. The First Defendant is a shareholder of the Second Defendant.

The Salient Facts

8. The following facts are derived from the material provided to me by the parties. By an email dated 31 May 2023, Mr Askar Karimullin, the CEO of the First Defendant wrote to the Claimant stating:

"Please prepare a contract of employment and an order for yourself "Associate at Khan Tengri Capital"

I. Khan Tengri Capital (documents of title are all in English and Russian languages)
   1. I request to make an order granting Ayan Iskakov the right to sign in the event of my absence (order below) today
   2. I also ask you to prepare an order/power of attorney entrusting Dias Iskakov with the right to open company accounts and related actions (including filing documents) and registration and representation of interests and related actions, today.
   3. Prepare the memorandum of association and articles of association of Khan Tengri Capital in 2 languages by tomorrow
   4. Decision to change the composition of participants according to the presentation (attached) deadline: 31 May

II. Apex Management GP (manage all legal and personnel activities of the company and support with internal documents, structuring transactions, obtaining licences and opening funds in the AIFC) Update the set of documents for submission to AFSA before 3 June, coordinate all issues with Aray Tursunov CEO…"

9. I have been provided with a written contract dated 30 May 2023, between the First Defendant and the Claimant. I assume that this is the contract of employment which Mr Karimullin directed the Claimant to prepare, in his email of 31 May 2023. According to the written contract, the Claimant was employed by the First Defendant as an 'Associate'. The relevant terms of the contract are set out below.

10. The Claimant has also provided me with various 'screenshots' from his mobile phone, of 'Telegram' and 'WhatsApp' written communications that he had with Mr Karimullin, the CEO of the First Defendant, and Mr Aray Tursunov, the CEO of the Second Defendant, over the period 5 June 2023 – 10 October 2023. It appears that some of the communications were voice messages. I have been provided with translations of both the written WhatsApp messages and the voice messages. The Defendants have not disputed any of the translations, hence I am content to adopt them as accurate translations. I say more about these communications below.

11. I have also been provided with emails covering the period 12 - 17 September 2023, between the Claimant and Mr Tursunov, in which Mr Tursunov wrote to the Claimant about various matters including the Articles of Association for the First Defendant and the documents that were required to open a bank account.

12. On 3 October 2023, the Claimant sent an email to Mr Tursunov, entitled "[Apex] Contract of Employment – Legal Counsel & Secretary" stating:

    "I am sending my signed contract of employment with Apex GP. As previously suggested, I have so far left a refund of salary arrears in KTC in the form of a subscription bonus from Apex. If the KTC pays the salary, it will be possible to remove this item later."

13. The contract enclosed with the email was stated to be effective from 8 September 2023. The Claimant states that Mr Tursunov responded indicating that he would need to consult with the

CEO of the First Defendant, as it was a shareholder of the Second Defendant, to seek approval for this.

14. According to the claim form, Mr Tursunov subsequently informed the Claimant that Mr Karimullin "had declined the Claimant's candidacy for the position of Legal Counsel & Secretary."

15. On 10 October 2023 the Second Defendant received a licence from the ASFA to carry out certain regulated activities.

16. On 25 October 2023, the Claimant wrote to the CEO of the First and Second Defendant, and the Legal Counsel and Secretary for both Defendants, setting out his claim for "unpaid salaries, damages and moral compensation..."

The Employment Contract With The First Defendant

17. Clause 2, entitled 'Commencement Date and Term' states as material:

> "…
> 2.1 This Contract of Employment shall be effective from the date of signing…
> 2.2 Employment commencement starts right after Apex Management Limited obtain Licence for Regulated Activities (Collective Investment Scheme) from Astana Financial Services Authority (ASFA)…"

18. The copy of the contract provided to me has been signed by the Claimant, but not the First Defendant. Moreover, Apex Management Limited (I assume the contract contains a typographical error and it should refer to Apex Management GP Limited) did not obtain a licence from the ASFA until 10 October 2023. However, as the Claimant and the First Defendant are in agreement that the written contract governs the employment relationship between the parties, and as the First Defendant accepts in the defence that the Claimant is owed wages for a period beginning in June 2023, I will proceed on the basis that the parties (rightly in my view) accept that the Claimant's employment with the First Defendant commenced on 1 June 2023.

19. Clause 3.1 of the contract stipulates the Claimant's monthly salary as follows:

> "…
> - 750 000 Kazakh tenge net for the first month from the date of signing of the Contract of Employment;
> - 1 500 000 Kazakh tenge net for all subsequent months."

20. Clause 6.1 stipulates that the Claimant is entitled to 24 Days of holiday leave a year. Under clause 6.4, an employee is entitled to payment in lieu of vacation leave earned, if the employee's employment is terminated.

Claim Against The First Defendant

21. The First Defendant accepts that the Claimant is entitled to the balance of his wages for June 2023, and the months of July 2023 and August 2023. As a result of this, the First Defendant

accepts that it must pay the Claimant a penalty for the delay in paying these sums, and it also accepts that the Claimant is entitled to payment in lieu of 6 days of vacation leave for this three-month period.

22. The Claimant however also claims his wages for the months of September and October 2023. Hence, it is these two months that in dispute.

23. The First Defendant denies that such wages are owed to the Claimant stating in the Defence, that after August 2023, the Claimant moved to "another city in September – October 2023, the Claimant was not actively involved in work." The First Defendant also states that the Claimant "has been out of contact since September 2023." On that basis, the First Defendant asserts that the Contract of Employment terminated from September 1, 2023 and therefore no wages are due to the Claimant for the months of September/October 2023.

24. The Claimant points out that he gave prior notification to Mr Karimullen (the CEO of the First Defendant) and Mr Tursunov (the CEO of the Second Defendant) of his decision to move back to Almaty. This is supported by a 'WhatsApp' conversation between the parties. Moreover, the Claimant points out that the applicable AIFC Employment Regulations do not encompass the concept of "employee inactivity."

25. I do not accept the First Defendant's assertion that the contract terminated from 1 September 2023. I have not seen any concern or objection raised by the First Defendant (or the Second Defendant for that matter) when informed by the Claimant that he had moved City; nor have I seen any other communications from the First Defendant complaining about the lack of activity on the part of the Claimant over the period September to October 2023.

26. Moreover, the mobile phone communications and email exchanges that I have been provided with do demonstrate that over September/October 2023 the Claimant was being asked by Mr Karimullin, and also Mr Tursunov, to carry out various activities, and the Claimant in fact did carry out those activities. If the contract had been terminated as the First Defendant suggests, then these exchanges would not have occurred.

27. I also accept the position as set out in the Claimant's Reply that the Claimant was actively participating in work for the First Defendant, and rendered his services and labour "…during June 2023 up until 31 October 2023..."

28. In my opinion, the contract of employment with the First Defendant continued over the months of September and October 2023.

Claim Against The Second Defendant

29. The Claimant claims that there was an implied contract of employment with the Second Defendant. In his letter before claim dated 25 October 2023 the Claimant states that he is owed "payment of the expected salary of KXT 2,000,000 since the date of incorporation of the Ltd - 8 September 2023, which equals to KZT 4,000,000, for my services in setting up the collective investment scheme." It appears therefore that the Claimant seeks payment for the period from 8 September 2023 to the 25 October 2023.

30. The first question I have to determine is whether or not there is an implied contract of employment. The Claimant states that he has carried out numerous activities in setting up a collective investment scheme in order to manage the Second Defendant. He refers to the fact that in official documents which were prepared as part of the submission to the AFSA, he was described as the Legal Counsel.

31. The position in the Defence, which is filed jointly on behalf of both Defendants, is that the activities which the Claimant carried out were consistent with the activities he was required to do under the written contract of employment with the First Defendant. The Defendants state that there was no official order of the Second Defendant officially appointing the Claimant to the role of Legal Counsel.

32. On balance and having regard to the documentary evidence and the written submissions of the parties, I accept the Defendants submissions. In my view, the activities carried on by the Claimant over the period 8 September 2023 to October 2023, which are evidenced in the mobile communications and the emails, are consistent with the list of activities contained in the email of 31 May 2023 as they fall within the description contained in the email of 31 May 2023, namely "…manage all legal and personnel activities of the company and support with internal documents, structuring transactions, obtaining licences and opening funds in the AIFC…" I also note that one of the activities which Mr Tursunov requested the Claimant to perform, which was set out in a message dated 25 September 2023, was to "…prepare an order for my dismissal from KTC (i.e. Khan Tengri Capital LLP) from September 7 at my own request…" i.e. this activity related to the First Defendant. I therefore do not find that there was an implied contract of employment between the Claimant and the Second Defendant over the period 8 September – 25 October 2023.

33. Finally, it should be noted that the other difficulty with the Claimant's position is that on the logic of his case, over the period September 2023 to 25 October 2023, he was effectively employed full time by two separate employers, entitled to two full time salaries and entitled to two sets of annual leave. I have seen no evidence that either the First or Second Defendant consented to this arrangement.

34. As I set out above, I find that over this period, the Claimant was in fact employed by the First Defendant.

35. Accordingly, the Claimant's case against the Second Defendant is dismissed.

Remedy

36. As against the First Defendant, the Claimant claims the following:

    (1) A request that the contract of employment be terminated with effect from 1 November 2023.

    (2) Accrued unpaid salary for the months June – 31 October 2023. The parties are in agreement that the Claimant is owed KZT 3,050,000 for the period June – August 2023.

(3) A penalty of KZT 211,239.30 in accordance with Article 113.3 of the Labour Code of the Republic of Kazakhstan. The First Defendant accepts that a penalty is owed, but that it only falls to be paid in respect of the wages for June – August 2023.

(4) Accrued unused vacation leave for the five-month period from 1 June 2023 to 31 October 2023. The Claimant states he has not taken any leave of this period. The First Defendant accepts that the Claimant is entitled to 6 calendar days of vacation for the three-month period of June to August 2023.

37. In light of the above, I grant the Claimant's request that the contract of employment be terminated with effect from 1 November 2023.

38. I also make the following monetary awards. The First Defendant must pay the Claimant the sum of KZT 6,702,415.77 which comprises the following:

(1) The sum of KZT 6,050,000 which represents the wages due to him for the months of June, July, August, September and October 2023.

(2) The sum of KZT 211,239.30 to represent the penalty due under Article 113.3 of the Labour Code.

(3) The sum of KZT 441,176.47 to represent 10 days of unused holiday leave for the period June – October 2023.

39. I do not grant the Claimant's request for damages related to his bank loan: the First Defendant was not a party to the loan agreement and was not involved in assisting the Claimant to secure the loan agreement. Nor do I award the Claimant any post-judgment interest or damages for moral harm. As the Defendants state in their Defence, the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated 27 November 2015, No 7, entitled "On the application by courts of legislation on compensation" provides a specific definition of 'moral harm.' I accept the Defendants' submission that the Claimant's claim does not satisfy this definition; hence no sums are awarded for this claim.

Timeline For Payment Of The Sums Due

40. The First Defendant is therefore required to pay the sum of KZT 6,702,415.77 to the Claimant by no later than Friday 9 February 2024. I have specified this short time frame for three reasons:

(1) The First Defendant has itself accepted that the Claimant is owed wages for the months of June, July and August.
(2) The wages due to the Claimant should never have been withheld from him.
(3) Unsurprisingly, the sums in question are significant for the Claimant and it is therefore in the interests of justice for the First Defendant to compensate the Claimant promptly and without further delay.

41. Finally, in respect of costs, both sides have asked for their costs. If the First Defendant does make payment within the period specified above, and in light of the fact that the Claimant has

succeeded in part as against the First Defendant, has not succeeded against the Second Defendant, and that these are small claims proceedings, I do not propose to make any costs order. There is no exceptional basis for doing so, hence each side must bear its own costs.

By Order of Court,

Saima Hanif KC
Justice, AIFC Court

Representation:
The Claimant was represented by Mr. Islambek Nurzhanov, independent external lawyer, Astana, Kazakhstan.

The Defendants were jointly represented by Ms. Aidana Tokina, independent Legal Consultant, Kazakhstan.

IN THE SMALL CLAIMS COURT
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

17 January 2024
CASE No: AIFC-C/SCC/2023/0041

"AURORA MINERALS GROUP" LLP

Claimant

v

APL "TEKŞAN MADEN"

Defendant

JUDGMENT

Justice of the Court:
Justice Charles Banner KC

ORDER

1. The Claim is allowed.
2. The Claimant's claim for costs is allowed.
3. The Defendant shall pay the Claimant the sum of 2,111,354 Tenge to be paid in that currency and no other, unless the Claimant agrees otherwise, within 28 days of the date of this Order.

JUDGMENT

1. In these proceedings the Claimant seeks an order that the Defendant pay it 2,111,354 Tenge in connection with an alleged breach of a contract dated 25th April 2023 and described as Service Agreement No. 1174/AMG ("**the Agreement**").

2. The Agreement provided that the Claimant (defined in the Agreement as "the Consultant") would perform certain services for the Defendant (defined in the Agreement as "the Client"), and that the Defendant would pay for those services in amounts specified by Clause 4.

3. The Claimant states that it performed its obligations under the Contract but that the Defendant has not paid it the amount of 2,060,800 Tenge (excluding VAT) that was due under Clause 4.3 for those services. The Claimant asks the Court to order the Defendant to pay that sum.

4. The Claimant seeks an additional 11,224 Tenge pursuant to Clause 5.1 of the Contract, which states:

> "In case of untimely payment under the Agreement, the Client shall pay the Consultant a fine in the amount of 0.01% of the total overdue amount for each calendar day of delay, but not more than 5% of the amount of delay payment."

5. The Claimant also seeks the costs of translating and notarising documents for the purposes of these proceedings, in the amount of 39,330 Tenge.

6. Collectively, these three sums amount to the overall amount of 2,111,354 Tenge claimed.

7. Clause 6.3 of the Agreement provides that the AIFC Court shall determine any disputes arising out of or in connection with the Agreement.

8. The value of the claim is below USD 150,000 and therefore the claim falls within the jurisdiction of the AIFC Small Claims Court: see Rule 28.2(1) of the AIFC Court Rules.

9. The Claimant states at paragraph 6 of the Claim Form that it notified the Defendant of its intention to bring legal proceedings for non-payment, but received no response from the Defendant. At paragraph 5 of the Claim Form, the Claimant further notes that prior to this there had been several other attempts to seek payment of the sums due but the Defendant did not engage and ultimately stopped responding.

10. On 11th December 2023, Mr Huseyin Hakan Teksan of the Defendant filed a letter with the Court, in lieu of a Defence, stating:

> "Yes we use service from Aurora. We paid the first part of the invoice like Advance. We are sending payment message also with this letter. After service done by Aurora We know to finish payment as we deal with Aurora. But we had a problem with our bank accounts its hold by Turkistan Tax office because of our accounting report. Our accounting office told us our electronic key validation

is over and i have to come Kazakhstan and take a new electronic key for company report. All this problem we offer to Aurora paying USD from UK or Turkey which is our base countries. But they didn't accept They asked Tenge payment. I didn't come yet to take this electronic key to open our bank accounts. Thats why we couldn't pay the invoice. As soon as open the Accounts we will pay the Invoice. I am planning to come in March 2023."

11. The Claimant filed a reply on 12th December noting that the sums in question were due from the Defendant, not its Parent Companies in the UK or Turkey, and that sums received in currency other than Tenge would incur additional tax burden.

12. Court is satisfied that the Defendant is obliged by the Agreement to pay the Claimant 2,060,800 Tenge as well as a fine of 11,224 Tenge for late payment. The Court does not consider that the Defendant's letter dated 11th December discloses any tenable basis for defending the Claim. The Agreement specified Tenge as the currency for payment. If that means that Mr Teksan or a colleague has to travel to Kazakhstan earlier than March, then such travel is a consequence of the contractual obligations that the Defendant has taken on.

13. That leaves the question of the costs claimed of 39,330 Tenge. In **Case 31 of 2023** ***JSC "Qazaq Air" v. Individual Entrepreneur Oruzbayev Talgat Kabdruselevich***, the Court observed as follows:

"10. Under Rule 26.9(2) of the AIFC Court Rules, costs may only be awarded against a party in the AIFC Small Claims Court where that party has acted unreasonably.

11. The Claimant has described its repeated efforts since May 2023 to resolve this matter out of court by correspondence with the Defendant sent both by email and by hand, as well as by telephone and in person. No response or even acknowledgment was forthcoming by the Defendant at any stage. The Claimant was therefore left with no option but to commence these proceedings, which the Defendant then did not defend or even respond to.

12. In ***Kostanai Minerals (Kazakhstan) v Factory Dnepropetrovskaya Volna OJSC (Ukraine)***,[1] this Court observed at para. 18:

> "…the kind of persistent failure and delay in complying with legal and procedural obligations demonstrated by the Defendant in this case, in particular the unexplained failure to comply with 4 the terms of the Mediation Agreement coupled with the equally unexplained failure to comply with Rule 28.12, may well in a future case lead to a finding of unreasonable behaviour so as to justify an award of costs under Rule 26.9(2)."

13. Having regard to the above, the Court finds that in the circumstances of the present case the Defendant has acted unreasonably, in persistently failing to engage with the Claimant's repeated attempts to resolve this matter out of court, thereby forcing the Claimant to commence these proceedings, and thereafter failing without explanation to comply with Rule 28.12."

14. The Court finds that the facts of the present case are, in this respect, indistinguishable from ***JSC Qazaq Air*** and ***Kostanai Minerals***. The Defendant's unreasonable failure to engage gave the Claimant no other option than to bring this claim. The Claimant's claim for costs is therefore allowed.

[1] Case No. AIFC-C/SCC/2021/014.

15. The Court therefore requires the Defendant to pay the Claimant the full amount sought of 2,111,354 Tenge (to be paid in that currency and no other, unless the Claimant agrees otherwise). This shall be paid within 28 days. This will allow time for Mr Teksan or another representative of the Defendant to make any necessary travel arrangements. There is no justification for a later deadline given the extensive efforts the Claimant has already made to recover the sums due from the Claimant and the Defendant's refusal to engage with those.

By Order of the Court,

Charles Banner KC
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Mr. Eldar Nazhiyev, "Aurora Minerals Group" Limited Liability Partnership.

The Defendant was represented by Mr. Huseyin Hakan Teksan, APL "TEKŞAN MADEN".

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

31 January 2024

CASE No: AIFC-C/CA/2023/0040

MICHAEL WILSON & PARTNERS LIMITED

Appellant

v

(1) CJSC KAZSUBTON
(2) KAZPHOSPHATE LLP
(3) KAZPHOSPHATE LIMITED

Respondents

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The required extension of time is granted but the applications for permission to appeal and a stay pending appeal are refused.

JUDGMENT

1. By proceedings in Case No. AIFC-C/CFI/2023/0002 the present Appellant, Michael Wilson & Partners, Limited, sought orders from the AIFC Court recognising and enforcing judgments given by the English High Court against the First and Second Respondents and/or judgments given by a Netherlands Court recognising and granting permission to enforce those English judgments. For reasons given in a judgment dated 26 September 2023 the AIFC Court of First Instance ("the CFI") declared that the Court had no jurisdiction to entertain those proceedings and ordered that the Claim Form be set aside and the proceedings be dismissed as against all three Respondents. By a separate judgment, dated 31 October 2023, the CFI made a consequential order for costs in favour of the Second and Third Respondents. Both judgments were given by the then Chief Justice of the Court, The Rt Hon The Lord Mance, following an *inter partes* procedure.

2. By the present application the Appellant seeks permission to appeal against those decisions, together with ancillary relief. The appellant's notice was filed on 30 October 2023 and amended on 21 or 22 November 2023 to add a challenge to the costs decision of 31 October. Written submissions in opposition to the application have been received from the Second and Third Respondents.

3. The Appellant has requested an oral hearing but the Court is satisfied that the application can be fairly determined on the papers without an oral hearing (see Rules 29.16-29.17 of the AIFC Court Rules).

4. The application requires an extension of time. By Rule 29.10 the appellant's notice must be filed within 21 days after the date of the decision of the lower Court. As regards the decision on jurisdiction, time ran from 26 September 2023, the date when the judgment was circulated by email to the parties, and not from 10 October 2023, the date contended for by the Appellant, when the physical signed original of the judgment was provided to the Appellant; and on that basis the appellant's notice was some 2 weeks out of time. The emailed judgment contained the decision and the reasons for it. It gave the Appellant all that was needed in order to determine what, if any, grounds existed for seeking permission to appeal. On the other hand, the added challenge to the costs judgment of 31 October 2023 was either within time or only just out of time. Allowance must also be made for the fact that the Appellant had to spend time during the relevant period dealing with the costs issues. Moreover, the application under consideration in the judgment on jurisdiction is a novel one and there is some value in considering the substance of the challenge to that judgment rather than dismissing the challenge on grounds of delay alone. Taking everything into account, the Court is satisfied that the required extension of time should be granted.

5. Permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be

heard: see Rule 29.6. Success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court: see Rule 29.7.

6. It is not necessary to repeat or summarise the judgments under challenge. Reference can be made to their text for the full context of the points discussed below.

7. Dealing first with the judgment on jurisdiction, it provides on its face a detailed, clearly reasoned and cogent analysis of the issues and a compelling conclusion. None of the grounds of appeal advanced by the Appellant causes this Court to doubt the correctness of the decision.

8. The first ground is that the CFI adopted the wrong procedure. It is submitted that in the common law world, applications for recognition and enforcement of foreign judgments are typically dealt with on the papers by masters, registrars and the like, not by senior judges, and other parties are not involved until a later stage; and it is contended in effect that the Court erred in not adopting a similar procedure in this case. Such a contention, however, lacks any merit. The AIFC Court Rules contain no special procedure for applications of this kind – unsurprisingly, given the CFI's finding that there is no jurisdiction to entertain them. The question whether jurisdiction existed was rightly determined by a judge of the Court (and was appropriately determined by the Chief Justice himself) applying the normal procedural rules governing claims and applications.

9. The second ground is based on a submission that as a matter of Kazakh law and practice, foreign judgments and orders are generally capable of being reciprocally recognised and enforced in the national courts of Kazakhstan, and that the CFI was in error in asserting the contrary at paragraph 52 of its judgment. Paragraph 52, however, makes the more nuanced point that the Appellant's case as to recognition and enforcement of foreign judgments by the AIFC Court, rendering such judgments enforceable not only within the AIFC but also throughout the Republic of Kazakhstan, "would have the direct effect of side-stepping any provisions of ordinary Kazakh law regarding recognition and enforcement of foreign judgments". Reference is made to an unsuccessful attempt by the Appellant to enforce the relevant judgments in the ordinary courts of Kazakhstan in 2006, and to Article 501 of the Civil Procedure Code of Kazakhstan "which provides for recognition and enforcement of foreign judgments by the ordinary Courts, but only under conditions and procedures determined by law or by international treaty ratified by the Republic". The point is made by the Appellant that the 2006 proceedings did not relate to or include the later English and Dutch judgments in issue and, more importantly, that foreign judgments and orders can be recognised and enforced in the ordinary courts of Kazakhstan on the basis of reciprocity, to which Article 501 of the Civil Procedure Code also refers. Those points serve to qualify, but do not undermine, the reasoning in paragraph 52 of the CFI's judgment. In any event, paragraph 52 provides only an additional and subsidiary reason for the CFI's conclusion as to the AIFC Court's lack of jurisdiction; and even if the paragraph were in error it would not affect the primary reasoning in support of that conclusion.

10. The third ground is an argument that the AIFC Court has jurisdiction because, on the *Respondents'* case, a company called KazChemicals LLP is now the sole participant in, and an integral part of, the Second Respondent and is itself an AIFC Participant, and the Court has jurisdiction over AIFC Participants. Such an argument is wholly unconvincing and fails to address, let alone to undermine, the reasoning of the CFI that the Court has a specifically delimited jurisdiction and that the present

proceedings do not fall within any of the heads of jurisdiction contained in particular in Article 13 of the Constitutional Statute and Regulation 26 of the AIFC Court Regulations. A generalised contention that the Court has jurisdiction over AIFC Participants takes the Appellant nowhere. It should also be noted that on the *Appellant's* case the Third Respondent, not KazChemicals LLP, is the sole participant in the Second Respondent and is subject to the jurisdiction by that route: that is a matter considered below in the context of the sixth ground of appeal.

11. The fourth ground is that Regulation 40 of the AIFC Court Regulations, in particular Regulation 40(3), envisages and allows the recognition of, and the grant of permission to enforce, English and Dutch judgments and not merely AIFC Court judgments and arbitral awards. Regulation 40 is, however, examined in detail at paragraphs 38 to 47 of the CFI's judgment, where the Appellant's arguments are considered and rejected. The submissions now advanced by the Appellant do not disclose any flaw in the Court's reasoning.

12. The fifth ground is that there is and was no need for the Appellant to file and serve a "claim", through the issue of a Claim Form, since reciprocal recognition and the grant of permission to enforce is always sought in court systems by means of an "application" and not by a "claim"; so that there was never any need for the Appellant to do anything other than file an "application", as it did. It is submitted that the Appellant should not be prejudiced by the AIFC Court's use of a standard form applicable both to claims and to applications; that in seeking reciprocal recognition and permission to enforce one does not have to prove jurisdiction; that it was wrong to involve the Respondents; and in summary that the CFI adopted the wrong procedure. Those points overlap with the substance of the first ground of appeal, dismissed above, and in any event they take the Appellant no further. They reflect the Appellant's argument summarised at paragraph 29 of the CFI's judgment, in particular that there is "no need to look within the Constitutional Statute or Court Regulations for a jurisdictional basis for a simple application of this sort". The CFI's judgment, however, rejects that argument on solid grounds. It establishes a clear requirement to find a jurisdictional basis within the Constitutional Statute and Court Regulations and (as set out at paragraph 53 of the judgment) for proceedings to be begun by completing a claim/application form identifying the head of jurisdiction relied on.

13. The sixth ground relates to paragraph 27 of the CFI's judgment, where the Court gives reasons why, even leaving aside the core jurisdictional issue, the Appellant had not made good any basis for seeking to join the Third Respondent in the claim. The submissions overlap with the third ground, considered above. It is contended that on the Appellant's case the Third Respondent was and is the sole participant in the Second Respondent, a limited liability partnership, and as such exercises management and control of the Second Respondent; the Third Respondent has assets in the jurisdiction, and the Appellant quite properly applied for permission to reciprocally recognise and enforce against it through the AIFC Court. As to the Respondents' case that KazChemicals LLP, not the Third Respondent, is now the sole participant in the Second Respondent, the validity of the alleged transfer of the participatory interests from the Third Respondent to KazChemicals LLP is denied, but it is contended that the exercise by KazChemicals LLP of its rights as sole participant in the Second Respondent would fall within Article 13.4(2) of the Constitutional Statute as "activities conducted in the AIFC" and within Regulation 26(1)(b) of the Court Regulations as "operations carried out in the AIFC". It is submitted that the CFI's judgment is in error in failing to address these various

matters. Such an argument is again wholly unconvincing. It does not undermine the reasons given in paragraph 27 of the judgment for holding that the proceedings against the Third Respondent were irregular and inadmissible, whatever the merits of the core jurisdictional issue. Nor does it provide any sensibly arguable basis for bringing the proceedings within the heads of jurisdiction in Article 13 of the Constitutional Statute or Regulation 26 of the Court Regulations or for otherwise doubting the correctness of the CFI's conclusion that there was no jurisdictional basis for the present proceedings in the Constitutional Statute or the Court Regulations.

14. The seventh and final ground relates to the costs judgment. It is submitted in summary that the CFI erred by not granting the Appellant an oral hearing to which it was entitled in relation to costs; by refusing to proceed by way of detailed assessment (the Chief Justice not being equipped to conduct the assessment exercise himself); by ignoring submissions of the Appellant which included evidence that the Third Respondent's legal representatives were paid by a bank and not by any of the Respondents, and submissions as to the excessive nature of the purported costs; and by not allowing a set-off of the judgment debts owed by the Respondents to the Appellant. None of those submissions is sustainable. The Court Rules confer no automatic right to an oral hearing in relation to costs. It lies within the discretion of the Court whether to deal with the matter on the papers or to direct a hearing. It cannot be said that the decision of the CFI to proceed in this case on the papers was an erroneous exercise of discretion. Further, all parties were given a fair opportunity to make submissions, and those submissions were plainly taken into account by the Court in reaching its decision on costs. The decision to order the Appellant to pay the Second and Third Respondents' costs was taken on a principled basis in accordance with the Rules; as was the decision, in the exercise of the discretion under Rule 26.13, to make an immediate assessment of the costs rather than to order a detailed assessment. The Court was reasonably entitled to accept the Respondents' documentation in support of their costs claims, and to reject the Appellant's objections. It was well within the discretion of the Court to make an immediate assessment in the full amounts claimed.

15. In conclusion, neither as regards the judgment on jurisdiction nor as regards the costs judgment would an appeal have a real prospect of success. Nor is there any other compelling reason why an appeal should be heard, given the clear-cut nature of the decision reached by the then Chief Justice of the Court and notwithstanding the potential significance of the jurisdiction issue.

16. Accordingly, the conditions for the grant of permission to appeal are not met and the application for permission must be refused.

17. As to ancillary relief, this Court has previously made an order refusing the Appellant's application for a stay pending determination of the application for permission to appeal. In the light of the refusal of permission to appeal, the Appellant's further application for a stay pending an appeal must also be refused.

By the Court,

Sir Stephen Richards

Justice, AIFC Court

Representation:

The Appellant was represented by Mr Michael Wilson, Partner, Michael Wilson & Partners, Limited, Almaty, Kazakhstan.

The First Respondent was not represented.

The Second Respondent was represented by Mr Bakhyt Tukulov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Kazakhstan.

The Third Respondent was represented by Ms Dinara Nurgazy, Associate, Kinstellar LLP, Almaty, Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

12 November 2024

CASE No: AIFC-C/CFI/2023/0038

International Academy of Medicine and Sciences Limited Liability Partnership

Claimant

v

State Institution "Health Department of Almaty Region"

Defendant

JUDGMENT

Justice of the Court:

The Lord Faulks KC

JUDGMENT

1. This case arises out of an agreement between the Claimant, the International Academy of Medicine and Sciences LLP and the Defendant, the State Institution "Health Department of Almaty Region", dated 5 November 2020. The agreement was a Public-Private Partnership agreement and concerned the running of the Almaty Multidisciplinary Clinical Hospital.

2. The Claimant is the "Private Partner"; the Defendant the "Public Partner". The agreement was expressed to be subject to PPP Law which is the Law of the Republic of Kazakhstan on Public-Private Partnership.

3. In the course of this judgment, I will refer to the parties, respectively, as the Claimant or Private Partner, and the Defendant or the State or Public Partner.

4. The claim arises out a failure by the Defendant to pay to the Claimant management fees owing under the agreement. It is not disputed that these have not been paid since July 2023.

5. The Defendant's response to the claim is that by refusing to admit the State Partner's representatives into the hospital the Claimant was and remains in breach of the agreement and thus the Defendant is entitled to withhold management fees.

6. The parties have exchanged skeleton arguments, called witnesses before me and made oral submissions. At the conclusion of the hearing, I invited the parties' lawyers to send to the Court any additional submissions they wished to make within 7 days of the end of the trial. Both parties have now (after the expiry of 7 days) sent further submissions. The Claimant's are concerned with costs, while the Defendant's consist of a further elaboration of the oral arguments advanced at trial.

7. The Claimant has been represented by Sergei Vataev, assisted by other lawyers. The Defendant has been represented by Ms Assel Kazbekova, also assisted by other lawyers. I am grateful to them all for their help in this matter.

The Agreement

8. My attention has been drawn to a number of provisions in the agreement. Those of particular relevance are set out below:

   Clause 107 provides for the payment of management fees.

   Clause 114 provides (among other things) that "The State Partner shall be entitled to:

   1. negotiate with the Private Partner on the terms of the Contract;

   2. conduct inspections of the financial and economic activities of the Private partner, but not more than once a year, including by involving an audit organisation hereunder;

   9. demand termination of the Contract in case of violation of its terms by the Private Partner."

   Clause 116 entitles the Private Partner to receive, inter alia, payment for the management of the hospital.

Clause 135 provides that in the event of a "violation of the requirements specified therein", the Public Partner can serve notice requesting elimination of the "violation".

Clause 140 entitles the Public Partner to be released of its obligations in the event of "violation".

Clause 143 confers jurisdiction on the AIFC Court in the event of a dispute.

Other clauses were referred to in argument.

The Pleadings

9. In the Particulars of Claim, the Claimant refers to the suspension of management fees and the Defendant's contention that the refusal to allow admission for an inspection of the hospital amounted to a violation of the agreement.

10. The Claimant pleads that the first attempt at an inspection on 26 June 2023 was eventually cancelled. The second attempt purported to be an audit with respect to the financial activities of the Private Partner. The relevant order was dated 28 July 2023. The order revealed that the Commission established in connection with the attempted inspection lacked any licenced auditor or someone with the relevant knowledge, experience and authority to conduct an audit of financial and economic activities. In those circumstances the Private Partner demanded cancellation of the order and refused to allow the Commission admission when they arrived on 31 July 2023.

11. The Claimant points out that the Defendant's suspension of the payment of management fees took effect from 26 June 2023 when it was not in fact until the 31 July 2023 that, on their own case, there was any justification for the suspension.

12. It is the Claimant's case that at the heart of this dispute is a failure by the State Partner fully to understand or respect the nature of the Public-Private Partnership agreement. The Claimant had in fact provided reports from independent auditors to the Defendant. The Defendant's rights under the agreement were restricted by Clause 114 and the Commission was not intended to carry out a proper audit, in accordance with the agreement, nor was it qualified to do so.

13. The Defence refers to the nature of the agreement in relation to the hospital, also known as the "PPP object". It sets out some of the financial implications of the agreement and refers to "an uneven distribution of funds" between the parties. The Defence emphasise that the PPP object "remains state property".

14. In paragraph 13 of the Defence it is maintained that the Private Partner was in violation of the agreement by failing to resolve the dispute by negotiations. This was not an argument maintained at trial and, if it had been, I would not have found a breach of the agreement.

15. In paragraph 17, an explanation for some of the delay in paying management fees is provided. It is said that this was because of late distribution of funds by the Treasury.

16. More significantly, it is pleaded at paragraph 19 of the Defence, that the State Partner was entitled to "verification of the financial and economic activities of the Private Partner" and that the State has not been provided with the "necessary documents, information and access". This is said to be a violation of contractual obligations. The State Partner's pleaded case is that, on the Private Partner's case, they, the State Partner must pay management fees but "do(es) not have the right to check what he pays

for".

17. The Reply takes issue with the Defence. It refers to a significant sum of debt, which was omitted, when the agreement was signed. The Private Partner had themselves to pay this debt. However it does not form part of the claim before me, and I make no findings in relation to this alleged concealment of debt.

18. It is accepted that both the agreement and the relevant legislation provides for the possibility of an audit of the financial and economic activities of the Private Partner but reliance is placed on Clause 114 (2) in maintaining that an audit that would have been permitted was never, in fact, attempted.

19. It is argued that there are limited circumstances in which the contract can be terminated, none of which arise in this case.

20. More generally the point is made that the Public Partner has conflated its usual public (administrative) functions and its rights and obligations under the agreement. Stress is placed on the principle of non-interference by the Public Partner with the activities of the Private Partner.

The Skeleton Arguments

21. The Claimant's skeleton summarises the arguments and draws attention to Clause 114 (10) and the reference to information available "upon written request". Attention is drawn to Article 17(2) (2) of the Public-Private Partnership law and Articles 272 and 273 of the Civil Code of Kazakhstan.

22. The Claimant maintains that the purported suspension of the payment of management fees was groundless and that there were in particular no grounds under Clause 140 for the Defendant to be released from its obligations under the agreement.

23. The Claimant updates the non-payment of management fees and sets out the basis for its claim for a "penalty".

24. The Defendant's skeleton outlines the witnesses that they originally intended to call and their alleged relevance.

25. There was also an application to amend the counterclaim. I refused the application on the grounds that it was far too late. Most of the oral arguments before me were an expansion of the arguments already contained in the Defence. The only substantive addition was in relation to the alleged failure by the Defendant to provide "Defect Reports", together with a response to the arguments in relation to the claim for a penalty.

The Trial

26. In opening the case, Mr Vataev summarised the claim and emphasised a number of points:

    (a) that the Private Partner continues to run the hospital, despite the non-payment of management fees;

    (b) that reliance on the refusal to admit for an inspection was a pretext for non -payment of management fees;

    (c) that the attempted inspections were of a wholly different character to the right to an

audit, as provided for by the agreement;

(d) that the State Partner seemed to have confused its role as a regulator and that of a Public Partner. If the state acts qua regulator, inspections can take place when registered with the Prosecutor's office, and where there is "good cause";

(e) attempts at inspection were either called off, invalidated by the Prosecutor's office or, in respect of 31st July inspection, refused by the Claimant;

(f) the State Partner was trying to punish the Private Partner by issuing "threats" that they would find faults in the hospital which they would find were material even if in fact immaterial;

(g) in answer to questions from me, he submitted that Clause 114(4) did permit access to the premises in certain circumstances but that this sort of access was of a very different character to that which was attempted.

27. The first witness was Mr Najhavan Rupal, one of the founders of the Claimant. In addition to his written statement (page 1534 of the documents), Mr Rupal explained the nature of the partnership agreement and his role as an investor. In cross-examination, he acknowledged that the hospital continued to function even though management fees had not been paid and that income was received from other hospital activities.

28. The Claimant next called Professor Ismailov (Core Bundle page 46). He gave evidence further to a detailed written witness statement. The professor has been involved in leadership posts for 23 years. He has a PhD. and has worked for the Ministry of Health in Kazakhstan. He has been engaged in a number of health initiatives and has managed the Regional Health sector.

29. He described the process of being presented with, and signing, a so called "model" contract. He told me that the only Clause that the Claimant added was a reference to the AIFC Court in case of a dispute.

30. Serious problems came to light at the hospital. In particular a misrepresentation as to the level of debt, and problems with both water and energy supplies. As a result, a sustained response was required from the Private Partner in a short space of time in order to bring the hospital into a satisfactory condition.

31. The professor described "illegal and unjustified harassment by the State partner and the Akimat since 2022" and attempts to "carry out illegal inspections". He told me that the Private Partner did not oppose inspections as provided for by the agreement but did object to illegal inspections outside the scope of the agreement.

32. He was asked whether he or the Claimant were given notice of any violations. He said that the Claimant had received no notice of any violation or of defects, either from the Private Partner, or indeed from the State.

33. In cross-examination, he explained that a once yearly audit was provided for by the agreement and that the Claimant had provided such an external audit to the Defendant.

34. The Defendant elected to make detailed oral submissions before calling witness evidence.

35. Ms Kazbekova submitted that the inspection was partly a result of media pressure and some evidence of the unsatisfactory state of the hospital.

36. She submitted that the case “did not involve public law" but that the State Partner must be allowed access to all hospitals as this was “standard procedure……to ensure compliance”.

37. The agreement, she said, had not been terminated but payments had been suspended because the Private Partner had not submitted any defect reports, as required. This justified withholding management fees. She also argued that there was a right to access the hospital and inspect documents which had been denied. She maintained that the Private Partner generally had not acted in good faith.

38. I asked her, on a number of occasions, to point to the relevant provision in the agreement which justified an inspection of the sort that was attempted. I never received an answer to my question.

39. She developed her argument in relation to “defects” further in post-trial submissions. It was not suggested that there were particular defects but that the obligation lay on the Private Partner to notify the State Partner of defects. This obligation would include what might be a nil return, i.e. that there were no defects to report.

40. Although Ms Kazbekova had originally intended to call witnesses who were critical of the state of the hospital, in the end she called one witness only, namely Mr Baiuzakov, whose written statement was at page 61 of the Core Bundle. He is described as the Deputy Head of the Health Department and an official representative of the State Partner.

41. His witness statement speaks of gross violations by the Private Partner. I did not find his statement easy to understand, although much of it seemed to concern the relative weakness of the State Partner’s position by virtue of the agreement as compared to the position if this had been a state run hospital. But when he gave oral evidence, the State Partner’s position became rather clearer.

42. In essence, he explained, the Public Partner was concerned about the amounts they were paying to the Private Partner and that they did not have sufficient information about how management was done. The contract was signed during Covid. They could not inspect in 2021 and after deciding to inspect in 2022, they were not permitted to do so by the Prosecutor’s office. That was the background to the attempted inspection.

43. Mr Baiuzakov told me that there was a new Head of Department who asked him why they were paying the management fees. Mr Baiuzakov added that there was no control or effective monitoring of the way the hospital was run and that by inspecting they wanted to “create a dialogue”. He denied issuing any threats.

44. He did not identify in advance any defects but said that on inspection he could have pointed out defects. He stressed that he wanted a wide inspection and that this what he regarded, in effect, to be the discharge of a duty he owed to the taxpayer.

Discussion

45. The agreement is not as clear as it might be as to the rights of the State Partner to gain access to the hospital. But what is clear that whatever their rights they derived from the agreement. PPP law makes that clear. They do not have some overriding rights simply because they are the State Authority . This was a partnership agreement.

46. It seems likely that if the hospital had been state-run then the Public Partner might have had more or less unhindered access to the hospital. I do not doubt that Mr Baiuzakov genuinely thought he was acting in the interests of the state in attempting a wide ranging inspection. I daresay that if he and the Commission had inspected the hospital, they would have found some "defects" or "violations" and then attempted to negotiate, or impose, a considerably reduced management fee. But in my judgment they were not entitled by the contract to carry out this sort of inspection.

47. It was accepted by the Private Partner that access could have been obtained to the hospital but it was argued, in my view correctly, that there is a difference between access and inspection.

48. The failure by Ms Kazbekova to identify in the agreement the provision which entitled the State Partner to inspect was significant. Her difficulty was that there was never any clarity, or indeed evidence, as to the basis for the inspection despite her valiant attempts to justify it. The attempt to justify the inspection on the basis of defects or a failure by the Private Partner to notify the State Partner of any defects (or the lack of them) was not, in my view, the real reason for, or basis of, the attempted inspection.

49. I found Professor Ismailov to be an impressive witness, who seemed to me most anxious for the hospital to succeed and to be frustrated at the way in which the State Partner appeared to ignore the contract and to rely on the fact that they were a state authority to sidestep their obligations. He told me, and I accept, that the Claimant was, and remains, willing to enter into discussions (and to allow access to the hospital) about particular issues that might arise from time to time. But he correctly pointed out that Clause 114 restricts the more general rights to that of carrying out an annual audit. The Commission was not qualified to carry out such an audit and that was not their intention.

50. In my judgment the Private Partner was entitled to refuse access to the hospital and the State Partner was wrong to refuse, and continue to refuse, to pay management fees.

Conclusions

51. The Defendant was and remains in breach of the agreement by failing to pay management fees from June 2023.

52. I declare that the order dated 31 July 2023 purporting to identify a violation of the agreement and to justify non-payment of management fees has no legal effect. The Defendant should pay all management fees owing as at the date of this judgment. If there is any dispute as to the amount, I will determine this on receipt of submissions from both sides. A figure should be capable of agreement.

53. The State Partner has not argued that the contract is at an end, and there were no grounds for any such argument. The contract remains in force and both parties must fulfil their obligations under the agreement.

54. As to the contractual penalty, the claim is limited to 153,000,000 KZT. The State Partner agrees the figure (although some important noughts are omitted from their calculations) but has argued that the suspension of payment of management fees was justified. I have rejected that argument and accordingly I order that the Defendant should pay the contractual penalty (or fine).

55. The Claimant also claims costs/expenses. I determine that they are entitled to their reasonable costs. The Claimant has served a list of expenses. I give the Defendant 28 days to respond. In the absence of an agreement on this issue, which I encourage, the court will decide on a figure at a hearing or on paper after receiving submissions in writing.

56. The Counterclaim is dismissed.

By the Court,

The Lord Faulks KC,

Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Sergei Vataev, Advocate, Legit Advocates' Bureau, Almaty, Republic of Kazakhstan.

The Defendant was represented by Ms. Assel Kazbekova, Associate Director at KPMG Tax and Advisory LLC, Almaty, Republic of Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 April 2024

CASE No: AIFC-C/CFI/2023/0035

CASHDRIVE LTD

Claimant/Appellant

v

ASTANA FINANCIAL SERVICES AUTHORITY

Defendant/Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The appeal is dismissed.

JUDGMENT

Introduction

1. Private Company Cashdrive Ltd ("Cashdrive"), a subsidiary of Seif-Lombard LLP, is a company registered in the AIFC and licensed by the Astana Financial Services Authority ("the AFSA") to conduct regulated activity in relation to the provision of credit. By these proceedings it appeals against a written directive issued by the AFSA on 15 March 2023 imposing specified requirements on the conduct of its business ("the Written Directive").

2. Cashdrive's licence was issued on 2 September 2021 ("the Licence"). The activity authorised by the Licence was: "*Providing Credit without permission to provide Credit Facilities to natural persons unless assessed as Professional Clients*." The criteria for assessment of persons as Professional Clients are set out in the AIFC Conduct of Business Rules ("the COB Rules") and require, in summary, that the Client has net assets of at least USD 100,000 and is assessed, on reasonable grounds, to have sufficient experience and understanding of relevant Financial Products, Financial Services, Transactions and any associated risks. Whether Cashdrive complied with the COB Rules is one of the main issues in the appeal.

3. No other restriction was expressed in the Licence (though the accompanying Authorisation Letter stated that the Licence was granted subject to the Risk Assessment Programme requirements annexed). Moreover, under the AIFC legislation in force at the date of issue of the Licence, credit facilities could lawfully be provided to natural persons resident in the Republic of Kazakhstan. Legislation adopted soon afterwards, however, prohibited the grant of loans to natural persons resident in Kazakhstan: loans could be granted only to *legal entities* of the Republic of Kazakhstan (and even then only in foreign currency) and to natural persons resident outside Kazakhstan. That was the effect of the AIFC Rules on Currency Regulation and Provision of Information on Currency Transactions in the AIFC ("the Currency Rules"), adopted on 10 November 2021 and coming into force on 1 December 2021. The application of the Currency Rules to Cashdrive's conduct of business pursuant to the Licence is another of the main issues in the appeal.

4. On 24 May 2022 the AFSA informed Cashdrive that it satisfied the AFSA conditions and recommendations specified in the Risk Management Programme. It was then open to Cashdrive to commence its operational activities, which it did on 26 August 2022.

5. On 28 October 2022 Cashdrive sent to the AFSA returns for the third quarter of 2022 from which it appeared to the AFSA that Cashdrive had entered into 15 loan agreements with natural persons since August 2022 and that in every case the natural person was resident in Kazakhstan and was not a Professional Client. On 30 November 2022 the AFSA requested assessment reports for each of the clients assessed as Professional Clients and any other relevant documents used in assessing them as Professional Clients. Cashdrive replied on 8 December 2022, providing further documents from which

it appeared that Cashdrive had by then entered into at least 44 loan agreements. In a WhatsApp exchange on 13 December 2022 the AFSA case officer asked about additional documents considered by Cashdrive during client classification and was told that Cashdrive observed all AIFC requirements. The AFSA case officer commented that the AFSA might request additional documents if needed. In the event, however, the AFSA team considered that available documents were sufficient and no further request was made. On 30 January 2023 the AFSA received Cashdrive's returns for the fourth quarter of 2022 which confirmed that Cashdrive had given loans to 44 clients who appeared to be natural persons.

6. Following review of the material provided to it, the AFSA concluded that Cashdrive was in breach of the Currency Rules and the COB Rules. This led to the issue of the Written Directive on 15 March 2023, in the following terms:

> *"Having considered the quarterly conduct and prudential returns of CASHDRIVE Ltd ('the Firm') for the 3rd quarter 2022 and explanatory notes to them as well as client documents (request dated 30 November 2022),* ***the AFSA directs the Written Directive and imposes the requirements*** *specified below pursuant to sections 95, 100(1)(a) and 103 of the AIFC Financial Services Framework Regulations ('FSFR').*
>
> *The Firm had been licensed to perform activity of Providing Credit without permission to provide Credit Facilities to natural persons unless assessed as Professional Clients.*
>
> *After review of the above returns and client documents, the AFSA has identified that in 3rd quarter 2022 the Firm has been providing loans to natural persons assessed as professional clients (total amount of issued loans – 15).*
>
> *However, the Firm's approach in identifying and classifying clients as professionals is superficial, informal and does not meet requirements set out in [the COB Rules]. Moreover pursuant to [the Currency Rules] the Firm can provide loans only to legal entities of the Republic of Kazakhstan, who are not AIFC participants, but not to natural persons who are residents of Kazakhstan.*
>
> *Consequently, this raises doubts on Firm's awareness of applicable requirements and knowledge in the area of Client classification. Formal approach of copying and pasting clauses from COB into declaration form, which is then simply signed by the clients claiming that they are Professional Clients is unacceptable and does not represent the Firm's ability to classify its Clients comprehensively and with due care. Also, as part of Client on-boarding procedure, the Firm does not request supporting documents from its Clients which can be used as a proof of evidence of client being a Professional Client (diplomas, extracts from bank account, past working history, etc.).*
>
> *In particular, the Firm has breached the following AIFC Rules – Currency Rules and COB:*
> - *Currency Rules section 3.1.1 …*
> - *Currency Rules item 1.2 of Schedule 2 …*

- *COB 2.5.1 …*
- *COB 2.3.1 …*

Therefore, the Firm is required to bring loan and conduct of business procedures into compliance with the Currency Rules and COB and fulfil the following requirements:

No	***Requirements***	***Due Date***
1.	*To terminate all loan agreements conducted with natural persons who are residents of Kazakhstan in violation of the Currency Rules and COB*	*14 April 2023*
2.	*To provide appropriately revised conduct of business procedures, including provision on assessment of Professional Clients and prohibition for offering loans to natural persons who are residents of the Republic of Kazakhstan*	*7 April 2023*

7. This was followed by substantial exchanges between the parties in the form of meetings and correspondence as detailed later in this judgment. The outcome was that the AFSA maintained its position with respect to Cashdrive's breaches of the Rules but extended to 1 September 2023 the deadline for terminating loan agreements concluded with natural persons who were residents of Kazakhstan.

8. Cashdrive's appeal against the Written Directive was brought by Claim Form issued on 24 October 2023. The subsequent procedural steps included a case management hearing and various written directions. The formal pleadings consisted finally of an Amended Claim Form, an Amended Defence and an Amended Reply. At the hearing of the appeal, which took place by video-link, the Court had before it a pleadings bundle, bundles of legislative and regulatory material and of legal authorities, a large bundle of witness statements and exhibits, and a small bundle containing documents the admissibility of which was disputed.

9. The witnesses for Cashdrive were Mr Gennady Kim, the company's Chief Operating Officer; Mr Vyacheslav Pak, Head of the Lending Department; and Ms Zhaukar Rakhimbekova, Deputy CEO. Cashdrive also put in, on a precautionary basis, the late witness statement of a client in response to notes of an interview with her by the AFSA, those notes being one of the documents the admissibility of which was disputed. The witnesses for the AFSA were Mr Anuar Kaliyev, Director of the Financial Conduct Division of the AFSA and formerly Director of the Prudential Division during the period relevant to this case; and Mr Olzhas Baisagatov, a Senior Associate of the Prudential Division with responsibilities as the relationship manager of Cashdrive during the relevant period. All the witness statements stood as evidence in the case, subject to limited cross-examination of Ms Rakhimbekova, Mr Kaliyev and Mr Baisagatov on the day of the hearing. Ms Rakhimbekova's evidence was unconvincing in some respects, as touched upon later in this judgment, but subject to that reservation I found the witnesses to be honest and trying to assist the Court.

10. Cashdrive was represented by Mr Bakhyt Tukulov, assisted by Ms Mariya Petrenko. The AFSA was represented by Mr Ben Jaffey KC. The Court is grateful to all counsel for the clarity and economy of their written and oral submissions.

Jurisdiction and governing law

11. Article 13(4) of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre confers exclusive jurisdiction on the AIFC Court in relation to the hearing and adjudication of disputes between AIFC Participants and AIFC Bodies, with the exclusion of jurisdiction in criminal and administrative proceedings. More specifically, Article 26(5) of the AIFC Court Regulations provides that the Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body "*as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to: (a) a question of law; (b) an allegation of a miscarriage of justice; (c) an issue of procedural fairness; or (d) a matter provided for in or under AIFC law*"; and it provides further that decisions of the Court of First Instance referred to in the article are final and shall not be subject to further appeal.

12. The provision of AIFC law of immediate relevance to the present case is section 11 of the AIFC Financial Services Framework Regulations ("the FSFR") which reads:

> *"**Appeals against decisions of the AFSA …***
>
> *(1) A Person aggrieved by a decision of the AFSA may appeal to the AIFC Court against the decision.*
> *(2) The grounds of an appeal under this section are that:*
> *(a) the decision was ultra vires or there was some other error of law;*
> *(b) the decision was unreasonable;*
> *(c) the decision was made in bad faith;*
> *(d) there was a lack of proportionality; or*
> *(e) there was a material error as to the procedure."*

13. The grounds of appeal in section 11(2) reflect those applied in judicial review at common law. As it is put by Justice Sir Jack Beatson at paragraph 14 of the judgment dated 24 January 2024 in Case No. AIFC-C/CFI/2023/0024, *Mr Moriel Carmi v Astana Financial Services Authority*:

> "*I note that the grounds enacted in Article 11(2) are those available in a common law application for judicial review which are used to supervise governmental and regulatory bodies and the legality and procedural fairness of their decisions. The supervisory jurisdiction is the means by which the exercise of power by a public authority is 'strictly limited to the scope and purposes of the [legislation granting it authority] and to the common law's insistence on rationality and fairness' …. Article 11(2) does not provide for an appeal on the substantive merits of a decision but on whether the decision-maker has made a recognisable public law wrong*."

14. It was argued in Cashdrive's Amended Reply that the Court should not apply English common law judicial review standards in the context of the AIFC but should develop its own approach taking into account such matters as the local realities of Kazakhstan, the quality of governance by AIFC Bodies

and the level of sophistication of local business. The argument was directed at persuading the Court to lower the bar for appellants challenging decisions of the AFSA. But the bar is set by section 11(2) itself. The focus of the grounds of appeal set out in that provision, as in judicial review at common law and as made clear in *Carmi v AFSA*, is on whether the decision-maker has made a recognisable public law error and not on the substantive merits of the decision. (Mr Tukulov appeared to object to Mr Jaffey's reliance on *Carmi v AFSA*, on the basis that it was a new point. The case relates, however, to an issue raised clearly in the pleadings and Mr Tukulov had a fair opportunity to make submissions on it.)

The appeal process

15. By section 11(3) of the FSFR, the procedure to be adopted by parties to an appeal and by the AIFC Court on such an appeal is set out in Schedule 2 to the FSFR. Paragraph 1 of Schedule 2 provides that *"[a]n appeal under section 11 may be instituted: (a) within a period of 28 days immediately following the date of the Decision Notice issued by the AFSA, and (b) by serving a Claim Form on the AFSA, in accordance with the service provisions of the AIFC Court Rules, stating the grounds and material facts on which the appellant relies*". Paragraph 3 of Schedule 2 sets out the powers of the Court to set aside or confirm the decision, in whole or in part.

16. Appeals are also the subject of Part 29 of the AIFC Court Rules. By Rule 29.1(2), the rules in Part 29 are expressed to apply to appeals to the Court of First Instance pursuant to Article 26(5) of the AIFC Court Regulations, i.e. including appeals of the present kind. Rule 29.3 provides, however, that Part 29 is subject to any Rule, enactment or Practice Direction which sets out further provisions with regard to any particular category of appeal. One obvious such provision is the 28 day time limit laid down by the FSFR, which must be taken to displace the 21 day time limit generally applicable under Rule 29.10(2) of the AIFC Court Rules. A further point is that the right of appeal under Article 26(5) of the AIFC Court Regulations is not expressed to be subject to a *permission* requirement, nor is any such requirement expressed in section 11 of the FSFR. This must be taken to displace the general provision in Rule 29.5 of the AIFC Court Rules that an appellant requires permission to appeal except where the appeal is against a contempt order. Another procedural qualification is that the FSFR requires an appeal to be instituted by service of a Claim Form on the AFSA, whereas Part 29 of the AIFC Court Rules requires an appellant's notice (see e.g. Rule 29.23) and lays down procedural steps different from those applicable to an original claim brought by service of a Claim Form. In practice, however, the Claim Form procedure followed in this case has caused no problem for the preparation of the case for hearing and it has not been necessary to consider the potential applicability of other provisions of Part 29.

17. One question that does remain is whether the appeal was out of time and, if so, whether an extension of time should be granted. A time limitation point was taken originally by the AFSA but the Amended Defence made clear that the point was no longer pursued. Whether the conditions for an appeal are fulfilled is nevertheless a matter for the Court: a statutory time limit cannot simply be waived by agreement between the parties. Although Schedule 2 to the FSFR does not itself refer to the possibility of an extension of the time limit, it plainly lies within the power of the Court to grant such

an extension in application of, or by analogy with, Rules 2.14 and 29.10-29.12 of the AIFC Court Rules and/or pursuant to the general powers conferred by Articles 26 and 27 of the AIFC Court Regulations.

18. On the basis of the 28 day time limit, the Claim Form should have been served on the AFSA by mid April 2023 at the latest; and since it was not issued until 24 October 2023 it was many months out of time. The AFSA's stated reason for not taking a time limitation point is that, given that it did not comply with the requirement to notify Cashdrive of its right to appeal (an omission discussed below), it would not be appropriate as a matter of good regulation for the AFSA to take such a point. That is a relevant factor for the Court in deciding whether to extend time. So too is the extent of the post-decision exchanges, described below, in which Cashdrive sought clarification and withdrawal of the Written Directive. More important, however, is that the case concerns the correct procedural approach to decision-making by the AFSA and raises a number of issues which have been fully argued and on which it would be helpful for the Court to express a considered conclusion. For those reasons, it is appropriate to grant the necessary extension of time so that the appeal can be decided on its substance.

The grounds of appeal and the relief requested

19. The grounds of appeal as ultimately pursued by Cashdrive may be summarised as follows:

    (1) breach of the requirements of procedural fairness, specifically by failure to comply with the procedures laid down by the FSFR, including the right to be informed of the proposed decision and to make representations on it before the decision was taken;

    (2) error of law and/or breach of legitimate expectation in applying the Currency Rules to the conduct of Cashdrive's business in circumstances where the grant of loans to natural persons resident in Kazakhstan was in full compliance with the terms of the Licence and the legislation in force at the date when the Licence was issued; and

    (3) misinterpretation or misapplication of the COB Rules as regards the assessment of Professional Clients.

20. The Amended Claim Form requests the Court (a) to make an order that the AFSA breached the FSFR procedure while issuing the Written Directive, (b) to make an order setting aside the Written Directive, (c) to make an order declaring that Cashdrive has complied with COB Rules, (d) to make an order declaring that Cashdrive has the right to conduct business according to the terms of the Licence, and (e) to grant such other relief as the Court finds just and appropriate. Claims for relief in respect of damages and loss of profits were abandoned after Cashdrive's attention had been drawn to the statutory immunity of the AFSA under section 11(4) of the FSFR.

The relevant powers of the AFSA

21. Article 12 of the AIFC Constitutional Statute established the AFSA and provides that it is responsible for the regulation of financial services and related activities in the AIFC. The AFSA has very broad powers of authorisation and supervision pursuant to the FSFR. Its main functions, powers and

objectives are set out in section 7 of the FSFR. The objectives listed in section 7(3) (the Regulatory Objectives) include "*(b) ensuring that financial markets in the AIFC are fair, efficient, transparent and orderly; (c) creating fair, transparent and non-discriminatory conditions for Centre Participants; (d) fostering and maintaining confidence in the AIFC's financial system and regulatory regime; … (f) preventing, detecting and restraining actions that may cause damage to the reputation of the AIFC or to the financial activities carried out in the AIFC by taking appropriate measures, including by imposing sanctions; (g) protecting interests of investors and users of financial services …"*.

22. By section 35(1)(a) of the FSFR the AFSA may grant an application for a Licence, variation or withdrawal of a Licence either without conditions, restrictions or requirements or with such conditions, restrictions or requirements as it considers appropriate. By section 95(1) it may exercise any of the powers set out in Chapter 1 of Part 8 at any time where it considers it necessary or desirable to do so in accordance with its Regulatory Objectives. The powers set out in Chapter 1 of Part 8 include, in section 100(1)(a), the power to require an Authorised Person to take or refrain from taking such action as the AFSA considers appropriate. Pursuant to section 103, where the AFSA makes an order, issues a direction or prohibition, or makes any requirement in relation to an Authorised Person pursuant to a provision of the FSFR or Rules or legislation administered by the AFSA, such Authorised Person must, unless he has a reasonable excuse, comply with such order, direction, prohibition or requirement.

The Currency Rules

23. The Currency Rules were developed in furtherance of Article 5 of the AIFC Constitutional Statute which provides that the terms of, and procedures for, currency transactions related to the provision of financial and professional services in the territory of the AIFC are to be regulated by AIFC Acts which are to be made with the agreement of the National Bank of the Republic of Kazakhstan. Under this procedure, the Rules were executed by the Governor of the National Bank and the Governor of the AIFC. The relevant provisions of the Rules are these:

> "*3.1.1: Unless otherwise prohibited under the Acting Law of the AIFC and(or) the legislation of [the Republic of Kazakhstan], AIFC participants have the right to provide financial and related services to residents that are not AIFC participants only in accordance with Schedule 2 to these Rules.*
>
> *Schedule 2: List of Financial Services provided by AIFC Participants to Residents that are not AIFC Participants*
>
> | *No.* | *Name of the service* | *Currency* |
> |---|---|---|
> | … | | |
> | *1.2* | *loans to legal entities of the Republic of Kazakhstan* | *Foreign currency*" |

24. It was explained in Mr Jaffey's written submissions (in a passage to which Mr Tukulov took objection on the ground that the point was not pleaded but to which I consider it appropriate to have regard as explaining the public interest behind the Rules) that the Currency Rules were made for regulatory,

currency control and fiscal reasons. It would be undesirable if all financial services could be provided to residents of Kazakhstan outside the existing local regulatory regime without being subject to any applicable currency controls and with the benefit of the taxation regime of the AIFC. The Rules delineate what financial services can be provided from the AIFC to residents of Kazakhstan. The key point for present purposes is that loans to natural persons are not included in the Schedule 2 list of financial services that may be provided to residents of Kazakhstan.

The COB Rules

25. The COB Rules contain a provision (COB 2.1.1) that an Authorised Firm providing any Financial Services to any Person must classify that Person as one of the following categories of Client: a Retail Client, a Professional Client, or a Market Counterparty. By COB 2.3.1, an Authorised Firm may classify a Person as a Professional Client if that Person (a) meets the requirements to be a Deemed Professional Client, or (b) meets the requirements to be an Assessed Professional Client, in accordance with COB 2.5.1 or 2.5.5, provided that Person has not been classified as a Retail Client in accordance with COB 2.6. This case concerns classification as an Assessed Professional Client in accordance with COB 2.5.1, which provides:

> "***2.5.1. Assessed Professional Clients: Individual Clients***
>
> *For the purposes of COB 2.3.1, an Authorised Firm may treat an individual Client as an Assessed Professional Client if:*
>
> *(a) the Client has net assets of at least USD 100,000; and*
>
> *(b) either:*
>
> (i) *the Authorised Firm assesses the Client, on reasonable grounds, to have sufficient experience and understanding of relevant Financial Products, Financial Services, Transactions and any associated risks; or*
>
> (ii) *the Client works or has worked in the previous two years in an Authorised Firm or any other authorised or regulated financial institution, including a bank, securities firm or insurance company, in a position that requires knowledge of the type of Financial Products, Financial Services or Transactions envisaged; and*
>
> *(c) the following procedure is followed:*
>
> (i) *the Client must confirm in writing to the Authorised Firm that it wishes to be treated as Professional Client either: (1) generally; (2) in respect of a specific Financial Product, Financial Service, or Transaction; or (3) in respect of a type of Financial Product, Financial Service, or Transaction;*
>
> (ii) *the Authorised Firm must give the Client a clear warning in writing setting out the protections that the Client may lose as a result of giving up its classification as a Retail Client; and*

(iii) *the Client must confirm in writing, in a separate document from the client agreement or other contract, that it is aware of the consequences of losing such protections*."

COB 2.5.2 provides that for the purposes of COB 2.5.1(a), the calculation of an individual Client's net assets (a) must exclude the value of the primary residence of the Client, and (b) may include any assets held directly or indirectly by the Client.

The factual history in greater detail

26. There are several steps to the authorisation process before a Licence is granted. After a preliminary meeting or call with the AFSA case officer and receipt of informal feedback the applicant sends a draft application for review. After receipt of further feedback at that stage, the applicant proceeds with submission of a formal application package. The AFSA case officer prepares a Risk Assessment report based on analysis of the documents provided in the application package and then submits the papers to the Authorisation, Waivers and Modifications Committee. Approval may be subject to implementation of conditions and requirements.

27. In the present case, upon review of Cashdrive's draft application package, the AFSA provided feedback in a letter of 15 June 2021. Cashdrive's formal application package followed on 27 July 2021 and included representations that, in summary, the company's immediate focus in its operational activities would be on providing credit facilities to legal entities; natural persons would be on-boarded only after completion of precautionary measures including verification of financial statements and other information extracted from open sources aimed to attest the client's financial soundness. Future target markets were both legal entities and natural persons. A Banking Business Supplement Form was submitted on the same date and included representations that Cashdrive would not be involved in micro financial activities and would be dealing with medium and high net worth individuals and high revenue legal entities; legal entities would be the major type of client, although providing credit to high net worth individuals would also be an integral part of the business. A further document was the proposed Credit Policy and Procedure Manual which described the role of Cashdrive's Credit Committee in examining and approving loan applications. The AFSA's Risk Assessment report on Cashdrive's application reflected that material, including the identification of legal entities as the major client type.

28. On 23 August 2021 the AFSA issued an In-Principle Approval Letter requiring Cashdrive to provide evidence of incorporation within the AIFC within 30 calendar days. An AFSA certificate of incorporation was duly submitted by Cashdrive. AFSA then issued the Licence dated 2 September 2021. The accompanying Authorisation Letter stated not only that the Licence was granted subject to the Risk Management Programme requirements annexed but also that Cashdrive should ensure upon commencement of operations that "*it is familiar with applicable provisions of the AIFC Regulations and Rules and the various requirements they contain*".

29. Events between then and the issue of the Written Directive have been sufficiently described in paragraphs 4-5 above: the AFSA's confirmation that Cashdrive satisfied the provisions of the Risk

Management Programme, the commencement of operations by Cashdrive, and Cashdrive's provision of documents to the AFSA between October 2022 and January 2023, by way of quarterly returns and in response to a request by the AFSA. The terms of the Written Directive then issued on 15 March 2023 have been set out in paragraph 6 above.

30. A meeting with the AFSA was held at Cashdrive's request on 27 March 2023, at which the AFSA explained the requirements of the Written Directive and the need for compliance with it and indicated that if justified a short extension to comply could be granted. This was followed by a lengthy letter from Cashdrive dated 28 March 2023, requesting clarification on the applicability of the Currency Rules and arguing that Cashdrive was operating within the scope of the Licence. The letter also sought clarification on the COB Rules specified in the Written Directive. It stated that in response to the AFSA's request dated 30 November 2022, documents on 44 clients were provided, "*disclosing a thorough analysis of the client's understanding of the financial product provided to them and the risks associated with it, verifying their experience in similar loan transactions, understanding of the risks involved in these types of transactions and meeting their obligations under such deals, with supporting documents obtained from the client*". It pointed out that the Written Directive mentioned 15 clients, asked for a list of them and asked whether Cashdrive understood correctly that the remaining 29 clients (out of the list of 44) had been assessed correctly. It further stated that to comply with the COB requirements Cashdrive conducted a three-step verification of customer data, details of which were set out and an example of which was given. The letter went on to state that *"[a]ll clients, without exception, are analyzed, and interviewed by the Company and the necessary document packages are prepared under the requirements of the COB and other AFSA and AIFC regulations or RK legislation*" and that "*[a]ll documents, as well as reports on the Company's client classification decision for all 44 clients, were provided as part of the AFSA request dated 11/30/22*". In addition, it included a table providing "*data on the availability of experience in the service of borrowing from each of the 44 clients, as evidenced by reports from the credit bureau, provided by customers of the Company, which had previously been sent to AFSA as part of the request dated 11/30/22*". It asked for further specifics of the violations of the COB Rules, requesting "*a written explanation of such violation, attaching each fact of such breach in every 15 cases and stating the defined clause of the COB*". The rest of the letter concerned Cashdrive's request for an extension of time for compliance with the Written Directive.

31. The AFSA's reply dated 12 May 2023 dealt briefly with the points raised by Cashdrive, though without referring to specific clients. On the applicability of the Currency Rules it recited the relevant provisions of the Rules and their effect. On the COB Rules it focused on the requirement to have net assets of at least USD 100,000, stating:

> "*After review of client dossiers, the AFSA has not seen evidence that CASHDRIVE Ltd has (i) performed any calculation of clients' net assets or (ii) has kept client dossiers that contain any supporting documents that will prove that clients indeed own net assets of at least USD 100,000. Instead, CASHDRIVE Ltd provided clients with a copy-pasted declaration form for signing and confirming that the client has net assets of at least [USD] 100,000 which does not comply with requirements of COB Rules 2.5.1 and 2.5.2. Merely submitting a declaration that someone has net assets of at least USD 100,000 does not mean that the person* ***in fact***

possesses net assets of at least USD 100,000. Consequently, this demonstrates that CASHDRIVE Ltd has superficial approach in classifying clients and that legislation requirements are seen by CASHDRIVE Ltd more as a bureaucratic matter than a regulatory necessity which should be taken seriously by the firm. In this regard, the AFSA does not consider CASHDRIVE Ltd and its management team to be acting with due skill, care and diligence. Effective compliance is a way of operating and not just check-listing formal statements and declarations.

Based on the above, in the AFSA's view CASHDRIVE is violating the above-mentioned COB Rules by:

- *failing to conduct proper calculation of clients' net assets;*
- *failing to collect supporting documents from clients which will prove their ownership of net assets of at least USD 100,000*."

The letter also contained a 4 month extension of the deadline for complying with the Written Directive.

32. Cashdrive sent a further letter, dated 3 July 2023, expressing disagreement with the AFSA's arguments and asking for further clarification. It questioned the "*retroactive*" application of the Currency Rules. It pointed out that the provisions of COB 2.5.1 "*do not contain any requirements for the Company to independently calculate the value of assets and/or obtain supporting documents on the value of assets, or to verify these documents*", and that the calculation may include assets directly or indirectly owned by the client. It argued that clients could not provide supporting documents for assets indirectly owned, owing to the need for third party consents. It stated that "*[t]he asset valuation methodology*" was provided to clients, who used it to calculate the value of assets and who could independently calculate or apply for such calculations to consulting companies; and that "*[e]valuation results with a guarantee that the assessment is made according to the calculation method, clients sign and attach to the package of documents for classification by professional clients, or provide supporting documents for asset valuation, which is reflected in the Company's client classification report, which we provided in December [2022] for each of our clients*". It complained that the AFSA had not yet provided a list of the 15 clients found to have been in breach of the COB Rules. More generally it expressed strong disagreement with the AFSA's comments about lack of professionalism and diligence, and insisted that all the COB requirements were fulfilled properly and in full. It also included a further request for extension of the deadline for compliance with the requirements set out in the Written Directive.

33. The AFSA's reply, dated 9 August 2023, concentrated on the application of the Currency Rules, stating *inter alia* that "*[a]ll financial organisations falling under the Currency Rules should align their activities with the requirements of the Currency Rules*" and that Cashdrive had commenced its business activities only in July 2022 "*and therefore should have straightforwardly complied with the Currency Rules*". It pointed out that Cashdrive might still provide credit to natural persons assessed as Professional Clients who were not residents of the Republic of Kazakhstan, and to legal entities regardless of whether they were residents of Kazakhstan (but only in foreign currency in the case of legal entities resident in Kazakhstan). Taking into account the arguments advanced by Cashdrive,

however, it did agree to extend to 1 September the deadline for terminating (or transferring to a newly established company) all loan agreements concluded with natural persons who were residents of Kazakhstan.

34. At a meeting between Cashdrive and the AFSA on 4 October 2023, the AFSA confirmed its position with regard to the Currency Rules and the COB Rules. Understanding that there was no prospect of an amicable solution, Cashdrive filed its Claim Form later in the same month.

Procedural fairness

35. The duty on a decision-maker to act fairly is given effect in the FSFR by way of a detailed procedural code. Section 10(1) of the FSFR provides: "*Where a provision in these Regulations or Rules made thereunder requires the AFSA to make a decision, the AFSA will follow the decision making procedures set out in Schedule 1*". Paragraph 2 of Schedule 1 states that the Schedule applies, subject to paragraph 3 (which is irrelevant for present purposes), where a provision in the Regulations or Rules requires or enables the AFSA to make a decision.

36. The provisions of the Schedule are detailed. Otherwise than in cases of urgency, considered below, the required procedures are as follows:

> "***4. Opportunity to make representations before a decision***
>
> *(1) If the AFSA proposes to make a decision to which this Schedule applies, it must first give the Relevant Person:*
>
> *(a) a written notice (a "Preliminary Notice") containing the information in paragraph (2); and*
>
> *(b) an opportunity to make representations to the AFSA in Person and in writing concerning the decision the AFSA proposes to take.*
>
> *(2) The Preliminary Notice must:*
>
> *(a) specify the proposed decision;*
>
> *(b) specify the reasons for that proposed decision, including any proposed findings of fact;*
>
> *(c) include a copy of the relevant materials which were considered in making the proposed decision;*
>
> *(d) inform the Person that they may make representations to the AFSA concerning the proposed decision; and*
>
> *(e) specify how and by when any representations may be made.*
>
> *(3) For the purposes of sub-paragraph 2(c), the AFSA:*

(a) may refer to materials (instead of providing a copy) if they are already held by the Relevant Person or are publicly available; …

….

(5) If the AFSA receives representations within the period specified in the Preliminary Notice, it must consider the representations in making the decision.

(6) If, after considering the representations, the AFSA decides:

(a) to make the proposed decision (either as proposed or with variations), then it must give the Person a Decision Notice under paragraph 5 …

….

5. Decision Notice

(1) If the AFSA decides to make a decision to which this Schedule applies, it must, as soon as practicable, give the Relevant Person a written notice (a "Decision Notice") specifying:

(a) the decision;

(b) the reasons for the decision, including its findings of fact;

(c) the date on which the decision is to take effect;

(d) if applicable, the date by which any relevant action must be taken by the Person; and

(e) the Person's right to seek review of the decision by the AIFC Court.

(2) The Decision Notice must include a copy of the relevant materials which were considered in making the decision.

(3) For the purposes of sub-paragraph (2), the AFSA:

(a) may refer to materials (instead of providing a copy) if they are already held by the Relevant Person or are publicly available … "

37. Limited provision is made in paragraphs 4(7) and 6 for the AFSA to dispense with the requirements of paragraph 4(1)-(6) if it concludes that any delay likely to arise as a result of complying with the procedures would be prejudicial to the interests of users or of the AFSA, but in that event an opportunity has to be provided for representations to be made and considered after issue of the Decision Notice. The relevant provisions read as follows:

"*4(7) If the AFSA concludes that any delay likely to arise as a result of complying with the procedures in this paragraph would be prejudicial to the interests of direct or indirect users of financial services or otherwise prejudicial to the interests of the AIFC:*

(a) the requirements of sub-paragraphs (1) to (6) do not apply; and

(b) the AFSA must provide the Person with an opportunity to make representations in accordance with the procedures in paragraph 6 after it has made the decision.

6. Opportunity to make representations after a decision

(1) If this paragraph applies under paragraph 4(7), the AFSA must:

(a) provide the Relevant Person with an opportunity to make representations to the AFSA in Person and in writing within a period of 14 days, or such further period as may be agreed, from the date on which the Decision Notice is given to the Person under paragraph 5; and

(b) inform the Relevant Person in the Decision Notice that they may make representations concerning the decision and specify how and by when any representations may be made.

….

(2) If the AFSA receives representations within the period specified in the Decision Notice, it must consider the representations in deciding whether to confirm, withdraw or vary the decision.

(3) If after considering representations received the AFSA decides:

(a) to confirm the decision, it must as soon as practicable notify the Person in writing that the decision is to stand (subject to any right of the Person to refer the matter to the AIFC Court for review) …."

38. Those procedural requirements are not only designed to ensure that the basic elements of procedural fairness are met in the decision-making process, but they also serve to promote properly informed and reasoned decision-making. A troubling feature of this case, however, is the complete absence of any attempt by the AFSA to engage with this statutory procedure in relation to the issue of the Written Directive. Mr Kaliyev states frankly in his witness statement: "*At the time, we did not apply the procedure in Schedule 1, because the AFSA thought that it did not apply to a Written Directive. That was an error of interpretation and the correct position has since been clarified in the rules"*. The clarification takes the form of an amendment to section 100 of the FSFR (the section under which the requirements in the Written Directive were imposed) whereby it is stated expressly in a new section 100(3) that "*The decision-making procedures in Schedule 1 apply to a decision made by the AFSA under this section*". But it is accepted by the AFSA that the procedures in Schedule 1 did apply as a matter of law even before that clarifying amendment; and the AFSA has apologised through counsel for the procedural errors that occurred in this case. What, then, was the extent of those errors?

39. Mr Jaffey submits that the AFSA was in error in failing to inform Cashdrive of a right to make representations *after* the Written Directive was issued but that there was no requirement to give Cashdrive the opportunity to make representations *before* the Written Directive was issued because, in lawful application of paragraph 4(7) of Schedule 1, the AFSA considered that the delay likely to arise as a result of prior notification and consultation would be prejudicial to the interests of customers and the interests of the AIFC. The argument is that delay would have meant that more customers (who on AFSA's case were not Professional Clients) would be taken on and lent money they should not have received, and delay would harm the interests of the AIFC in permitting

continued lending in obvious and serious breach of the Currency Rules and the COB Rules: Cashdrive's conduct was prejudicial to the interests of the AIFC as a properly regulated financial centre where the regulatory perimeter is properly enforced. A further argument is that lending to natural persons who were not Professional Clients was outside the scope of the Licence and put Cashdrive in breach of the General Prohibition in section 24 of the FSFR, with serious potential consequences for the enforceability of its lending agreements and for its own solvency.

40. Some factual support for those arguments is to be found in the evidence of the AFSA's witnesses. For example, Mr Kaliyev states that "*[t]he AFSA's reputation and the integrity of its perimeter had been put at risk by Cashdrive's serious misconduct. A delay would have been prejudicial to the AIFC and to Cashdrive's customers*"; and "*it was important to act with immediate effect to minimise further harm to consumers*". There is, on the other hand, nothing to show that the General Prohibition played any part in the AFSA's thinking at the relevant time. Moreover, the fact that three months were allowed to elapse between the last communication with Cashdrive about relevant documents, on 13 December 2022, and issue of the Written Directive on 15 March 2023 – a period during which no concerns were expressed at all to Cashdrive about the conduct of its business – casts some doubt on the need to act without giving Cashdrive an opportunity to make representations before a decision was made. I note, too, that the Written Directive itself says nothing about urgency. Indeed, the first mention of urgency and the need to avoid delay came in the AFSA's Amended Defence many months later. In any event, the fact that the procedural requirements of Schedule 1 were thought not to apply at all meant, as it seems to me, that minds were simply not directed to whether a conclusion should be reached within the terms of paragraph 4(7), such as to justify the disapplication of the Preliminary Notice procedure and the opportunity to make representations before a decision was made.

41. Had there been a considered conclusion within the terms of paragraph 4(7) of Schedule 1, the Court would be slow to question the regulatory authority's judgment on such an issue. In the circumstances of the present case, however, I find it difficult to accept the argument as to urgency and I think it right to proceed on the basis that the full procedural safeguards were engaged, including the giving of a Preliminary Notice and an opportunity to make representations under paragraph 4(1)-(6) before a decision was made, followed by a Decision Notice complying with paragraph 5.

42. The failure to follow that procedure was highly regrettable but I do not accept that it was necessarily, as Cashdrive submits, a fundamental defect which rendered the decision arbitrary and could not be remedied afterwards. Whether it gave rise to a *material* breach depends on the contents of the Written Directive itself, the extent to which it complied with the requirements of a Decision Notice, the extent to which Cashdrive was able to make post-decision representations in relation to the decision, whether those representations were given fair consideration by the AFSA, and whether anything raised in the post-decision representations or in the present proceedings undermines or is capable of undermining the reasoning on which the decision was based.

43. Cashdrive's complaints about the contents of the Written Directive are, for the most part, best examined in conjunction with the substantive issues concerning the application of the Currency Rules and the COB Rules, dealt with in the next sections of this judgment.

44. It is accepted by the AFSA that the Written Directive failed to include a statement about Cashdrive's right to seek review of the decision by this Court, as required by paragraph 5(1)(e) and/or paragraph 6(3)(a) of Schedule 1. That error was plainly immaterial. Cashdrive evidently had legal advice from an early stage and should have known about its right of appeal. In any event it went on to exercise that right, albeit out of time, and has obtained the extension of time that enables the right to be exercised in full.

45. Although Cashdrive was given no invitation to make representations about the decision, it can be seen from the factual history in paragraphs 30 to 34 above that extensive representations were in fact made by Cashdrive and considered by the AFSA, which made substantial responses to them. Mr Tukulov submitted that because of the mind-set of administrators whose experience lies within the Kazakh system, coupled with concerns about the adverse effect on authority and public image, it is impossible in practice for a public institution to withdraw a decision once it has been made. Whatever may be the position more widely, upon which I am not qualified to judge, I do not accept that any such assumption should be made about the AFSA or its employees. The factual history does not give me the impression that the AFSA approached the matter with a closed mind. On the contrary, where the weight of the argument was seen to favour an amendment to the requirements laid down in the Written Directive, as was the case in relation to an extension of the deadline for terminating or transferring relevant loan agreements, the amendment was made. The fact that the AFSA otherwise maintained its decision is entirely consistent with its being satisfied that, notwithstanding the representations to the contrary, the decision was correct: whether that was a justified conclusion is examined in the next sections of this judgment. Furthermore the procedural structure laid down in Schedule 1 to the FSFR (including the possibility of post-decision representations in an urgent case and an obligation to consider any representations received in deciding whether to confirm, withdraw or vary the decision) presupposes and requires a greater flexibility of mind and willingness to change course in the light of representations received than Mr Tukulov's submission would allow.

46. As to whether anything raised in the post-decision representations or in the present proceedings undermines or is capable of undermining the reasoning on which the decision was based, that again is best examined in conjunction with the substantive issues concerning the Currency Rules and the COB Rules.

47. To the extent that it is possible to form a view on the matter thus far, the matters discussed tend towards a finding that the procedural failures in this case were immaterial. A final conclusion on that point, however, must depend on what emerges from consideration of the issues concerning the Currency Rules and the COB Rules.

The application of the Currency Rules

48. It is common ground that under the legislation in force at the date of issue of the Licence it was lawful to provide credit facilities to natural persons resident in Kazakhstan. The Currency Rules came into force on 1 December 2021, after the date when the Licence was issued but many months before Cashdrive commenced operations pursuant to the Licence. The relevant provisions of the Rules are

set out at paragraph 23 above. The relevant effect of the provisions is *inter alia* to prohibit the provision of credit facilities by AIFC Participants to natural persons who are residents of Kazakhstan.

49. Cashdrive contends, however, that the prohibition does not apply to it, or should not be applied to it by the AFSA, because the Licence predated the Currency Rules and permitted the provision of credit facilities without such a restriction. It is said that Cashdrive conducted its business in full compliance with the terms of the Licence and AIFC Acts that were in force as of the date when the Licence was granted, and that the Currency Rules did not have retroactive effect.

50. In my judgment, Cashdrive's submissions on this issue lack substance. It is no part of the AFSA's case that the Currency Rules had retroactive effect, and plainly they did not do so: they did not apply to the provision of credit facilities *prior to* their commencement date of 1 December 2021. The AFSA's case, which I accept, is that they applied prospectively to the provision of financial services by AIFC Participants *on or after* their commencement date and that they therefore applied to the provision of loans by Cashdrive. The fact that the Licence contained no such express restriction and that no such restriction existed under the AIFC legislation in force at the date when the Licence was issued did not create an exemption from, or exception to, the effect of subsequent legislation or entitle Cashdrive to do business without compliance with such subsequent legislation. A licence-holder is bound to operate in accordance with the AIFC legislation in force from time to time. If that legislation imposes restrictions on the future conduct of business pursuant to an existing licence, it is no defence that such restrictions were not included in the terms of the licence or that they did not exist under the previous legislation: they must still be complied with. (Mr Tukulov objected that Mr Jaffey's reference to the prospective effect of the Currency Rules was a new point, but the point seems to me to have been inherent in the AFSA's case from the outset and to be in any event an obvious one.)

51. In what is effectively an alternative argument in respect of the Currency Rules, Cashdrive submits that the AFSA's enforcement of those Rules against it by way of the Written Directive was in breach of legitimate expectation. It is submitted that the AIFC promised to establish favourable conditions for the development of new financial technologies and to create a flexible and predictable regulatory environment, giving rise to key expectations of transparency, clarity and predictability of legal regulation and protection of investors' interests. Cashdrive expected support from the AIFC jurisdiction when starting its business and looked forward to mutually beneficial cooperation with the regulator. It is also said that Cashdrive's reasonable and legitimate expectations were formed on the basis of the AIFC legislation in force at the time of making a decision to invest in the AIFC.

52. Those submissions are supported in general terms by the witness statement of Mr Gennady Kim and the first witness statement of Ms Zhaukhar Rakhimbekova, but it is unnecessary to go into the detail of the evidence on the point. The case gets nowhere near one where enforcement of a legislative provision of this nature might be prevented by the existence of a legitimate expectation. As Mr Jaffey submitted, to claim a legitimate expectation Cashdrive would need to show it had received a promise not to make relevant changes to the regulatory regime applicable to it; but there was no such promise, let alone one that was "*clear, unambiguous and devoid of relevant qualification*" (*R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569g). Even if such a promise had been made, further restrictive conditions would have to be met before effect

was given to it on grounds of legitimate expectation (see, for example, *R (on the application of Aozora GMAC Investment Ltd) v Her Majesty's Revenue and Customs* [2020] 1 All ER 803). There are strong public interest reasons why a regulatory authority should be free in principle to make changes over time to the regulatory regime, and the particular change in this case was made for solid reasons of public interest. Such considerations would weigh heavily against a finding of legitimate expectation justifying an exception to the general application of such legislation. (Mr Tukulov objected to Mr Jaffey's introduction of that judicial review case-law into his written submissions, but the material is of direct relevance to the pleaded case and Mr Tukulov had sufficient opportunity to respond to it.)

53. It follows that there was no error of law in the AFSA's finding in the Written Directive that Cashdrive was in breach of the Currency Rules. The finding itself and the resulting imposition of requirements to bring Cashdrive's procedures into compliance with the Currency Rules were legally sound. Nothing that Cashdrive put forward in its post-decision representations or that it has put forward in the present proceedings is capable of undermining the finding. On this point, therefore, the AFSA's failure to follow the correct procedures in relation to the making of the Written Directive was plainly not material and the grant of relief in relation to the point would be neither justified nor useful.

The application of the COB Rules on the assessment of Professional Clients

54. The relevant COB Rules are set out in paragraph 25 above.

55. Cashdrive's procedures for granting a loan, and specifically its procedures for classifying clients as Professional Clients, are described at some length in the witness statements of Ms Rakhimbekova and Mr Pak. I will refer to some salient points rather than setting out the detail. The process of granting loans is regulated by Cashdrive's "Rules for issuing loans secured by a vehicle", itself a lengthy document available on the company's website. To get a loan a potential client must study those Rules, which include a provision that loans are available only to Professional Clients; study the "Standard Terms and Conditions of a Loan Agreement" which again include a provision that a loan will be issued only if a client meets the requirements of a Professional Client, with the client giving confirmation by signing that he or she is a Professional Client; study the "Notification of Client Classification" which encloses the client classification methodology; provide Cashdrive with a signed "Application-questionnaire Form – AIFC Client Classification" where the client declares in terms that he or she has net assets of at least USD 100,000 and also meets the condition as to relevant experience and understanding, and confirms that he or she has read and fully acknowledges the Notification of Client Classification; provide Cashdrive with a signed "Application form for granting a loan secured by a vehicle" which includes a client's confirmation that he or she has studied the Standard Terms and requirements of the AIFC and that he or she complies with all the criteria of a Professional Client; and, when the loan is approved, sign and submit an "Application for adherence to the Standard Terms of the Loan Agreement" which again includes confirmation that the client has studied the Agreement itself (Standard Terms) and is a Professional Client and agrees with all the clauses of the Agreement. It should be noted that all of this involves certification by the clients themselves that they meet the relevant requirements. It is of course only a limited part of the information provided: other matters include personal details, the amount and term of the loan

requested, the purpose of the loan, details of the vehicle on which the loan is to be secured, income, debts, credit history and the like.

56. According to Cashdrive's witness statements, Cashdrive in its turn requests reports and data on the client and his or her assets from databases available to the company (credit bureau reports, state databases of individuals, tax service websites, etc.) and has the right to request bank statements and account information, reports of independent valuation experts, and purchase and sale agreements (if any) to understand that the client has provided reliable information about assets. Cashdrive also verifies, in open sources or accessible databases, documents provided by the client and declared information about participation in a business or ownership (direct or indirect) of movable or immovable property. The credit department conducts an additional interview with clients to verify the data provided by them and requests any necessary documents, including employment contracts, certificates, bank statements and other documents confirming experience in the financial market (including obtaining and fulfilling loans), as well as the documents for a motor vehicle provided as collateral. Although relied on by Cashdrive in relation to classification of clients as Professional Clients, I have to say that much of that process of checking appears to me to be directed not so much to that issue as to the separate questions of security for a loan and a client's ability to repay the loan.

57. The reasons given by the AFSA in the Written Directive for finding breaches of COB 2.3.1 and COB 2.5.1 were that Cashdrive's approach in identifying and classifying clients as Assessed Professional Clients was "*superficial, informal and does not meet the requirements set out in the [COB Rules]*"; that "*[f]ormal approach of copying and pasting clauses from COB into declaration form, which is then simply signed by the clients claiming that they are Professional Clients is unacceptable and does not represent the Firm's ability to classify its Clients comprehensively and with due care*"; and that "*as part of Client on-boarding procedure, the Firm does not request supporting documents from its Clients which can be used as a proof of evidence of client being a Professional Client (diplomas, extracts from bank account, past working history, etc.)*" (see paragraph 6 above). In essence, the complaint was that it was left to clients to self-certify that they met the relevant conditions, and Cashdrive did not do enough to check the clients' claims and to obtain supporting documents so as to ensure that the COB requirements, in particular those of COB 2.5.1(a) and (b)(i), were in fact met.

58. The Written Directive referred to the AFSA's identification that in the third quarter of 2022 Cashdrive had been providing loans to natural persons assessed as Professional Clients; and it added "*total amount of loans – 15*". The concerns expressed in the decision were based, on the face of it, on those 15 transactions. But the AFSA had in fact received by this time, in response to its request of 30 November 2022 and in the returns for the fourth quarter of 2022, information as to a total of 44 loan agreements entered into with natural persons; and the evidence shows that all 44 transactions were taken into account in the decision to issue the Written Directive. Cashdrive's post-decision representations sought to make much of the difference between the figure of 15 and the figure of 44, claiming not to know which were the 15 clients mentioned in the Written Directive and purporting to understand that the remaining 29 had been assessed correctly as Professional Clients. In responding to those representations the AFSA drew no distinction between the 15 and the rest of the 44 and made sufficiently clear in my view that its concerns related to review of client dossiers generally. Although Cashdrive continued to press for a list of the 15 clients referred to in the Written

Directive, pursuing it as far as a formal request for information served (and duly answered) in the course of the appeal proceedings, I am satisfied that the true position was sufficiently clear from the terms of the Written Directive itself and that Cashdrive understood or should have understood that the 15 were the clients appearing in its own returns for the third quarter of 2022.

59. The AFSA's concerns have been spelled out more fully in the post-decision exchanges and in the appeal proceedings than they were in the Written Directive. It is said that the limitation on lending to non-professional clients was imposed for reasons of consumer protection and because of the high existing debt burden of retail customers in Kazakhstan. Contrary to Cashdrive's original representations that the focus of its business would be on lending to legal entities, it did not take on any legal entities as clients. Instead, it generally provided relatively modest loans to natural persons resident in Kazakhstan, usually secured on their cars (often very old) and at very high rates of interest (an interest rate of 44% was applied to all loans, regardless of value). The purpose of the loans is generally described in Cashdrive's documentation as "*consumer credit*" and many of the loan documents contain customer representations that they were "*applying for a consumer loan for non-business purposes*". One of the development strategy documents describes the business as an "*auto pawnshop*" for "*car owners who have a temporary need for money, mainly to close the gap on a business transaction or to purchase goods*". Loans were made semi-automatically using an automated scoring system. Cashdrive simply accepted a client's unverified self-declaration that he or she fulfilled the conditions to be a Professional Client, in circumstances where that self-declaration was inherently unlikely to be true. Why would a person with *net* assets of USD 100,000 (excluding the value of their primary residence) require a loan of a few thousand dollars at extremely high rates of interest? Was it likely that the only collateral they could offer was a modest vehicle whose age was often measured in decades? Cashdrive did not conduct a proper calculation of clients' net assets or collect supporting documents to prove that they had net assets of at least USD 100,000. There was no evidence that the financial assets condition was satisfied. Further, Cashdrive had no reasonable basis for concluding that the condition as to experience and understanding of relevant financial products and any associated risks was satisfied. The fact that a client had taken out a previous loan and repaid it was not sufficient to establish a professional level of knowledge. The purpose of the requirements is to ensure that a customer is sophisticated and can reach his or her own informed view about the appropriateness of lending.

60. Cashdrive, on the other hand, submits that it did comply with the requirements for assessment of clients as Professional Clients. The COB Rules establish a system of checks and controls that protects vulnerable clients from purchasing financial products that they do not understand. Cashdrive was guided by the literal meaning of the relevant rules and developed a thorough due diligence system to classify its clients that proved to be effective. It consolidated all the relevant information in various documents; clients expressed their agreement and their fulfilment of the requirements by signing the documents; all of them were experienced entrepreneurs, some were accountants or directors; and all of them understood the essence of the financial product in question. The number of defaults and overdue loans was in practice zero. It is said that the AFSA did not understand how Cashdrive's business worked and should not have been telling it how to conduct its business rather than establishing general guidelines. The procedure adopted by Cashdrive, directed towards a specific financial product and a specific category of client, was a reasonable one. Cashdrive further contends

that it could have presented more documents and proof on the correctness of clients' classification if it had been given the opportunity to do so before the Written Directive was issued and that the Written Directive itself did not explain what was wrong in the process of client classification. It complains too that AFSA was not responsive to Cashdrive's post-decision representations and questions about the nature of the alleged breaches.

61. I accept that the reasons given on this issue in the Written Directive, and the relevant findings of fact, are expressed in rather thin and general terms. There was a corresponding lack of specificity as to what was required by way of "*appropriately revised conduct of business procedures*" as regards the assessment of Professional Clients. I have no doubt that the matter would have been dealt with more fully and in greater detail if Cashdrive had been given the opportunity it should have been given to make representations before the decision was made. One sees, for example, the way in which reasons relating to the requirement of net assets of at least USD 100,000 were developed in the AFSA's letter of 12 May 2023 (paragraph 31 above). The Written Directive did, however, identify the essence of the AFSA's concerns and refer to the documents on which they were based, all of which had been provided to it by Cashdrive itself; and since the documents were all held by Cashdrive, there was no requirement to provide copies of them.

62. The COB Rules set out the conditions to be met before a client may be treated as an Assessed Professional Client but they do not specify what steps have to be taken by an Authorised Firm to ensure that clients meet those conditions. They do not state, for example, that an Authorised Firm must carry out the calculation of a client's net assets for itself, or that it must obtain supporting documents, rather than leaving it to the client to certify that the condition is met. There appears to be considerable room for flexibility in the way the rules are applied. I therefore have some sympathy for the approach taken by Cashdrive when faced with the bare wording of the rules and in the absence of guidance from the AFSA. Ultimately, however, it is for the AFSA as the regulatory authority to determine in the light of the policy context and regulatory objectives how the rules are to be applied. The AFSA is an expert body on which broad powers of supervision are conferred by the FSFR, as mentioned at paragraph 21 above. It has to be satisfied that the conditions have been met and has to form a judgment on what needs to be done for that purpose. To put it another way, the answer to the question whether the relevant COB Rules have been complied with depends not just on a simple interpretation of the rules but on an exercise of judgment by the AFSA - an exercise of judgment with which the Court will be slow to interfere. The AFSA, not the Court, is the primary decision-maker on such an issue, and it is to be recalled that section 11 of the FSFR "*does not provide for an appeal on the substantive merits of a decision but on whether the decision-maker has made a recognisable public law wrong*" (see *Carmi v AFSA*, paragraph 11 above).

63. I am satisfied that on the basis of the documents it had received by the time of the Written Directive, and in particular the 15 loan agreements specifically referred to in the Written Directive, the AFSA was entitled to form the view it did, that Cashdrive's approach involved a failure to comply with the COB Rules. In relation to the requirement of net assets of at least USD 100,000, the AFSA neither misinterpreted COB 2.5.1(a) nor misapplied the rule in holding that Cashdrive's approach to assessment was inadequate and that more needed to be done by way of calculating a client's net assets and obtaining documentary support. Similarly, in relation to the requirement to assess the

client, on reasonable grounds, to have sufficient experience and understanding of relevant financial products and any associated risks, the AFSA was entitled to hold Cashdrive's approach to be inadequate: the AFSA's judgment that the matters relied on by Cashdrive did not provide reasonable grounds for the assessments made was a judgment lawfully open to it.

64. Would it or might it have made a difference to the outcome if Cashdrive had been given the opportunity it should have been given to make representations before the Written Directive was issued? As I have said, the matter would in my view have been dealt with more fully in the light of such representations, but the essence of the AFSA's concerns would have remained the same and would have remained justified. I have not seen anything in the post-decision representations or the evidence in these proceedings to cause me to think that the decision might have been different or that a sustainable ground of challenge to it might have emerged. I accept the AFSA's submissions on this.

65. I have borne in mind Cashdrive's case, including the evidence of Ms Rakhimbekova in the course of cross-examination, that Cashdrive could have provided additional documents relating to client classification but the AFSA had not requested them. Yet as far back as 30 November 2022 the AFSA requested assessment reports for each of the clients assessed at that time as Professional Clients and any other documents used in assessing them as Professional Clients (see paragraph 5 above); Cashdrive provided documents in response to that request as well as by way of its quarterly returns, and also had ample opportunity to provide any further documents as part of its post-decision representations and in the course of the appeal proceedings. There can in my view be no serious possibility that Cashdrive could now produce additional documents capable of throwing significant new light on the matter and of changing the outcome.

66. I should mention that I have left out of account the AFSA's notes of recent interviews of two clients, together with the witness statement obtained from one of those clients by Cashdrive in response: such material is too recent and too thin to have a material bearing on the issues before the Court. I have also left out of consideration, as being unnecessary for my decision, the other documents in the bundle of documents the admissibility of which was disputed.

67. I attach no significance to the mere fact that the focus of Cashdrive's lending business was originally stated to be loans to legal entities but the entirety of loans was made in practice to natural persons. Cashdrive has explained this shift in business model by changes in market conditions, in particular that after the Russian invasion of Ukraine lending to legal entities became very risky. Whether or not that is a satisfactory explanation, it does not matter. The possibility of loans to natural persons was contemplated from the outset and was permitted by the Licence, provided that the clients were properly assessed as Professional Clients. If they were so assessed, it was permissible in principle for all of Cashdrive's business to be by way of loans to natural persons, though the separate effect of the Currency Rules was that such persons had to be resident outside Kazakhstan. That remains the case today. As the AFSA has made clear, Cashdrive's Licence has not been suspended and it is still open to Cashdrive to provide loan facilities to natural persons provided that they are resident outside Kazakhstan and are properly assessed to be Professional Clients.

68. In conclusion on this issue, however, here too the AFSA was entitled to reach the decision it did in the Written Directive; the failure to comply with the procedural requirements of Schedule 1 to the FSFR was not material; and the grant of relief would be neither justified nor useful.

Conclusion

69. For the reasons set out above, the Written Directive was issued in breach of the relevant procedural requirements but the breaches were ultimately immaterial, and on the issues of failure to comply with the Currency Rules and failure to comply with the COB Rules the AFSA was entitled to reach the decision it did. Cashdrive's appeal against the Written Directive therefore fails and the relief sought by it must be refused.

By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant/Appellant was represented by (1) Mr Bakhyt Tukulov, Partner, and (2) Ms Mariya Petrenko, Associate, both of Tukulov Kassilgov Shaikenov Disputes LLP.

The Defendant/Respondent was represented by Mr Ben Jaffey KC, Blackstone Chambers, as instructed by Mr. Ishaq Burney, Chief Legal Officer, AFSA.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

28 February 2024

CASE No: AIFC-C/SCC/2023/0032

Mr. Sayan Abdikhairanov

Claimant

v

Astana International Exchange Ltd.

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner KC

ORDER

1. The Claim is dismissed.

JUDGMENT

1. By Order dated 5th December 2023, the Court adjourned these proceedings for the reasons set out in the Judgment of that date ("**the December Judgment**"). The same abbreviations as are defined in the December Judgment are used below.

2. The Claimant accepts that the Defendant, AIX, filed a report to CIP in the terms outlined in para. 4 of the December Judgment, as it had said to the Court that it would do.

3. However, CIP's stance remains that the period in which the Claimant worked for AIX remotely from the USA did not qualify as relevant work for the purposes of the Tripartite Agreement which governed the terms of his scholarship. The Claimant strongly contests that position.

4. The insurmountable difficulty that the Claimant has in these proceedings is that CIP are not a party to these proceedings and the AIFC Court does not in any event have jurisdiction to determine the Claimant's dispute with CIP. This conclusion is reinforced by (albeit not dependant upon) the fact that, as explained in AIX's written submissions, the Claimant has already sought to ventilate that dispute in the domestic courts of the Republic of Kazakhstan.

5. The Claimant has tried to circumnavigate this difficulty by submitting that AIX is a party to the Tripartite Agreement. The Court rejects that submission for the reasons given by AIX in its written submissions. In particular, there is insufficient evidence to demonstrate on the balance of probabilities that AIX agreed to become a party to the Tripartite Agreement. In any case, this submission, even if correct, would not assist the Claimant since his complaint is against CIP, not AIX.

6. The Claim is therefore dismissed.

By Order of the Court,

Charles Banner KC

Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by himself.

The Defendant was represented by Ms. Guldana Mirasheva, Head Legal at Astana International Exchange Ltd, Astana, Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

15 January 2024

CASE No: AIFC-C/CFI/2023/0029

GENERAL CONTRACTORS GROUP LTD

Claimant

v

BI CONSTRUCTION & ENGINEERING LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink KC

ORDER

1. **The Court sanctions under section 124 of the AIFC Companies Regulations 2017 the proposed arrangement for a reconstruction involving the amalgamation of the Claimant with the Defendant.**

2. **Pursuant to section 126 of the AIFC Companies Regulations 2017 the Court orders that the Defendant be amalgamated with the Claimant on the basis set out in the Merger Agreement between them dated 28 July 2023.**

JUDGMENT

1. By an application filed in Case Number AIFC-C/CFI/2023/0029 by Claim/Application Form dated 20 September 2023 ("the Claim Form"), the Claimant, "General Contractors Group Ltd" (with Business Identification Number ("BIN") 230640900342) ("the Company") seeks the following relief as against (but without opposition from) the Defendant, "BI Construction & Engineering LLP" (with BIN 170840021153) ("the LLP"):

   (a) an order under section 124 of the AIFC Companies Regulations 2017 ("the AIFC Companies Regulations") sanctioning an arrangement proposed between the Company and the LLP for a reconstruction involving the merger of the LLP with the Company; and

   (b) an order under section 126 of the AIFC Companies Regulations giving effect to the merger of the LLP with the Company.

2. References below to "Document x" are to a document numbered "x" listed in and filed with the Claim Form.

3. The Company is a Private Company incorporated in the Astana International Financial Centre *[Documents 3 (Company Certificate of Incorporation) and 5 (Certificate of state registration of a legal entity relating to the Company) and Claim Form Section 2 paragraph 1]* and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations).

4. The Shareholders are a Private Company, "BI Group Ltd", and a Limited Liability Partnership, "BI Capital", and who are the "Founders" and sole shareholders in the Company *[Documents 1 (Articles of Association for the Company) and 5]*.

5. The LLP is a legal entity registered outside the AIFC and operating in accordance with the legislation of the Republic of Kazakhstan and the Company Founders and Shareholders are also the sole Founders of and Shareholders of in the LLP *[Document 4 (Certificate of state re-registration of a legal entity relating to the LLP]*.

6. It is stated in the Claim Form, supported by a statement of truth signed by Abiltusupova Aigerim Abilkhazievna, who states that they are duly authorised to sign that statement on behalf of the Company and who holds a relevant Power of Attorney from the Company *[Document 8]*, further it is confirmed in the documents filed with the Claim Form, that the Company Shareholders have agreed on behalf of the Company and the LLP Shareholders have agreed on behalf of the LLP to the merger of the LLP with the Company *[Claim Form Section 2 paragraphs 3 and 4 and Documents 10 (EGM minutes – Company) and 11 (EGM minutes - LLP]*.

7. Although the following requirements are not addressed expressly in the Claim Form, it is to be noted:

   (a) that, while Section 124(2) of the AIFC Companies Regulations empowers the Court to order a meeting of the Shareholders of the Company, no such order is required in this case because the sole Shareholders have already approved the proposed procedure, as indicated above;

   (b) further, that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders of the Company present and voting at the shareholders' meeting has been met (Document 10 as listed in the Claim Form);

   (c) further that, under the "Agreement on merger of [the LLP] with [the Company]" dated 28 July February 2023 (Document 13 as listed in the Claim Form) ("the Merger Agreement"),

      1. the Company undertook to notify the creditors of the Company about the upcoming the reorganization of the Company and LLP; and

      2. the LLP undertook to notify the creditors of the LLP about the upcoming the reorganization of the Company and LLP.

8. Documents filed in support of the application include:

   (a) the various documents already referred to above;

   (b) the Charter of the LLP *[Document 2]*;

   (c) the Merger Agreement *[Document 13]*

   (d) Confirmation that the Company has no debts recorded by the state revenue authorities *[Document 6]*;

   (e) Confirmation that the LLP has no debts recorded by the state revenue authorities *[Document 7]*;

   (f) Copies of notices to 13 identified creditors of the LLP of the Company's reorganization by merger with the LLP *[Document 9]*;

   (g) Financial reporting data for the LLP as at 1 August 2023 *[Document 14]*;

(h) Financial reporting data for the Company as at 1 August 2023 *[Document 15]*;

(i) Certificate of assets, capital and liabilities to be transferred from the LLP to the Company under the Merger Agreement *[Document 16]*.

9. The Merger Agreement describes an agreement between the LLP and the Company to carry out a reorganization in the form of a merger between the Company and the LLP involving a transfer of property from and all rights and obligations of the LLP to the Company. The Merger Agreement expressly refers at clause 1.1 to the EGM minutes for the Company and the LLP *[Documents 10 and 11]* referred to above and states that the decisions of the Company and the LLP as recorded in those documents is the basis of the reorganization forming the subject matter of the Merger Agreement.

10. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% Shareholders (Section 124(1)(b)).

11. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, for the reason set out in paragraph 7(a) above.

12. The Court has not been informed of any objection to the proposal. Moreover, the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company in circumstances where:

(a) all those creditors/contracting counterparties in respect of whom information has been provided to the Court have been notified of the proposed reorganisation [*Document 14]* and all of the assets and capital of the LLP, which are broadly similar in value to the value of its liabilities *[Documents 14 and 16]*;

(b) the Company has no separate liabilities of its own *[Document 15]*;

(c) the share capital of the Company post-reorganisation and merger will be equal to the sum of the equal prior capitals of the Company and the LLP (clause 3.1 of the Merger Agreement), and

(d) each of the Company and the LLP consent to the proposed reorganisation, and in particular to the transfer of all the LLP's obligations to the Company, the Company and the LLP having first fully disclosed to each other all of their respective assets and liabilities.

13. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.

14. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.

15. This raises the question of whether the Court has power to make an order under Section 126 where, as here, one of the entities to be involved in the amalgamation, namely the LLP, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

> *"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section,* ***but that wording is not exhaustive of the forms of amalgamation that may be ordered*** *("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC."* (emphasis added)

16. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the LLP be amalgamated with the Company on the basis set out in the Merger Agreement between them dated 28 July 2023 *[Document 13]*.

By the Court,

Justice Andrew Spink KC

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

4 November 2024

CASE No: AIFC-C/CFI/2024/0040

AOM Rail B. V.

Claimant

v

"KENMART" LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 30 October 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in para 31 of the IAC Arbitration Award dated 16 October 2024 made by Ms. Snezhana Kutsenko, the sole arbitrator appointed by a letter dated 1 July 2024 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 90/2024.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   - to recover from "KENMART" LLP, BIN 150440033159, in favour of AOM Rail B.V, BIN 181250004705, the amount of debt in the amount of KZT 1,619,628,362 (one billion six hundred and nineteen million six hundred and twenty-eight thousand three hundred and sixty-two);
   - to recover from "KENMART" LLP, BIN 150440033159, in favour of AOM Rail B.V, BIN 181250004705 *costs of the arbitrator's fee in the amount of KZT 500,000 (five hundred thousand)*;

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Kairat Baisanov, authorised by power of attorney.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

31 October 2024

CASE No: AIFC-C/CFI/2024/0039

CLAIMANT

Claimant

v

DEFENDANT

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 31 October 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in […] of the IAC Arbitration Award […] made by Mr. Alexander Korobeinikov, the sole arbitrator appointed by a letter dated 23 May 2024 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 18/2024.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

I.

II.

III.

IV.

V.

VI.

VII.

VIII.

IX.

X.

XI.

XII.

XIII.

XIV.

XV.

XVI.

XVII.

XVIII.

XIX.

XX.

XXI.

XXII.

XXIII.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by […]

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

15 November 2024

CASE No: AIFC-C/CFI/2024/0038

BI DEVELOPMENT LTD

Claimant

v

BI-DEVELOPMENT LIMITED LIABILITY PARTNERSHIP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink KC

ORDER

1. **The Court sanctions under section 124 of the AIFC Companies Regulations No. 2 of 2017 the proposed arrangement for a reconstruction involving the merger of the Claimant with the Defendant.**

2. **Pursuant to section 126 of the AIFC Companies Regulations No. 2 of 2017 the Court orders that the Defendant be merged with the Claimant on the basis set out in the "Agreement on Merger" between them dated 16 January 2024.**

JUDGMENT

1. By an application filed in Case Number AIFC-C/CFI/2024/0038 by Claim/Application Form dated 27 March 2024 ("the Claim Form"), the Claimant, "BI Development Ltd" (with Business Identification Number ("BIN") 230940900501) ("the Company") seeks the following relief as against (but without opposition from) the Defendant, "BI-Development Limited Liability Partnership" (with BIN 091240004107) ("the LLP"):

   (a) an order under section 124 of the AIFC Companies Regulations No. 2 of 2017 ("the AIFC Companies Regulations") sanctioning an arrangement proposed between the Company and the Defendant for a reconstruction involving the merger of the LLP with the Company; and

   (b) an order under section 126 of the AIFC Companies Regulations giving effect to the merger of the LLP with the Company.

2. References below to "Document No. x" are to the document number "x" listed in Section 4 to and filed with the Claim Form.

3. The Company (formerly known as "Residence Development Group Ltd", its name having been changed to "BI Development Ltd" with effect from 22 August 2024) is a Private Company incorporated in the Astana International Financial Centre *[Document No. 3 (Company Certificate of Incorporation in the name of Residence Development Group Ltd showing the same BIN as referred to above for the Company) and 4 (Information about the registered legal entity, in the name of the Company) and Claim Form Section 2 paragraph 2]* and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations).

4. The 99% shareholder in the Company is a Private Company "BI Group Ltd" (BIN 211040900280) and the 1% shareholder is the LLP *[Document No. 1 paragraph 6.3 (Articles of Association of the Company)]*.

5. The LLP is a legal entity registered outside the AIFC and operating in accordance with the legislation of the Republic of Kazakhstan in which the Company is the 99% shareholder/participant with the 1% shareholder/participant being Garant Service NS LLP *[Claim Form paragraph 6; Document No. 2 (Articles of*

Association of the LLP) and 5 (Information about the registered legal entity), in both cases showing the 99% participant to be Residence Development Ltd].

6. It is stated in the Claim Form, supported by a statement of truth signed by Arzhan Saduakassov (who states that they are duly authorised to sign that statement on behalf of the Company and who holds a relevant Power of Attorney from the Company *[Claim Form Section 2 paragraph 15; Document No. 27 (Power of Attorney dated 24 September 2024)]* and the LLP *[Document No. 26 (Power of Attorney dated 24 September 2024)]*), further it is confirmed in the documents filed with the Claim Form, that the Company's shareholders have agreed on behalf of the Company and the shareholders/participants in the LLP have agreed on behalf of the LLP to the merger of the LLP with the Company *[Claim Form Section 2 paragraph 7; Document No. 9 (Minutes of the Extraordinary General Meeting of the shareholders of the Company dated 3 September 2024) and 10 ((Minutes of the Extraordinary General Meeting of the shareholders of the LLP dated 3 September 2024); and 11 (Amalgamation Agreement dated 3 September 2024)*.

7. Although the following requirements are not addressed expressly in the Claim Form, it is to be noted:

   (a) that, while Section 124(2) of the AIFC Companies Regulations empowers the Court to order a meeting of the shareholders of the Company, no such order is required in this case because the shareholders have already approved the proposed procedure, as indicated above;

   (b) further, that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders of the Company present and voting at the shareholders' meeting has been met, as indicated above;

   (c) further that, under the "Amalgamation Agreement" dated 3 September 2024 *[Document No. 11]*, the LLP undertook to notify all known creditors of the LLP in writing about the decision on reorganization and publish the decision in the prescribed manner in the official press.

8. On 10 September 2024, the LLP sent a notice to all its known creditors *[Claim Form Section 2 paragraph 9; Documents Nos. 13-24]* and, on 1 September 2024, the LLP and the Company published a notice in the newspaper "Kazakhstanskaya Pravda" regarding the reorganization in the form of the merger of the LLP with the Company *[Claim Form Section 2 paragraph 9; Document No. 12]*.

9. It is stated at Section 2 paragraph 9 of the Claim Form that, as at the date of the Claim Form, neither the LLP nor the Company has received any objections from creditors regarding the merger of the LLP with the Company.

10. According to a letter at *Document No. 8* dated 3 September 2024, the LLP's assets are sufficient to meet its liabilities as at that date. Further, according to paragraph 11 of Section 2 of the Claim Form, the rating agency Fitch Ratings has assigned the Company a Long-Term Issuer Default Rating of "BB" with Stable Outlook.

11. Documents filed in support of the application include:

    (a) the various documents already referred to above;

    (b) Confirmation that the Company has no debts recorded by the state revenue authorities *[Document No. 6]*;

    (c) Confirmation that each of the Defendants has no debts recorded by the state revenue authorities *[Document No. 7]*.

12. The Amalgamation Agreement describes an agreement between the Company and the LLP to carry out a reorganization in the form of a merger between the Company and the LLP involving a transfer of property from and all rights and obligations of the LLP to the Company. The Amalgamation Agreement expressly refers at paragraph 1.1 to the fact that this reorganization will be *"In accordance with the transfer act approved by the general meeting of each of the Parties"*.

13. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed by the Company and its 100% Shareholders (Section 124(1)(b)).

14. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, for the reason set out in paragraph 7(a) above.

15. The Court has not been informed of any objection to the proposal. Moreover, the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the Defendants to the Company in circumstances where:

    (a) all those creditors/contracting counterparties in respect of whom information has been provided to the Court have been notified of the proposed reorganisation (see paragraphs 8 and 9 above) and all of the assets and capital of the LLP, which are broadly similar in value to the value of their respective liabilities (see paragraph 10 above) are to be transferred to the Company which, under the Agreement on Merger, takes over all of the liabilities of the LLP; and

    (b) each of the Company and the LLP consent to the proposed reorganisation, and in particular to the transfer of all the obligations of the LLP to the Company, the Company and the LLP having first fully disclosed to each other all of their respective assets and liabilities.

16. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.

17. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.

18. This raises the question of whether the Court has power to make an order under Section 126 where, as here, two of the entities to be involved in the amalgamation, namely each of the Defendants, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

> *"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section,* ***but that wording is not exhaustive of the forms of amalgamation that may be ordered*** *("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC."* (emphasis added)

19. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the Defendants be merged with the Company on the basis set out in the Agreement on Merger between them dated 16 January 2024 *[Schedule No. 18]*.

By the Court,

Justice Andrew Spink KC

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 September 2024

CASE No: AIFC-C/CFI/2024/0037

Private Company "iKapitalist Ltd"

Claimant

v

(1) "Nurly Kus" LLP

(2) Sara Omarova

(3) Oleg Tyo

Defendants

JUDGMENT AND ORDER

Justice of the Court:

The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 23 September 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in Part VII of the IAC Arbitration Award dated 20 August 2024 made by Ms. Snezhana Kutsenko, the sole arbitrator appointed by a letter dated 3 June 2024 of Mr. Thomas Krümmel, the Chairman of the AIFC International Arbitration Centre, in IAC Arbitration Case No 73/2024.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   - to satisfy claims of Private Company "iKapitalist Ltd" BIN 191140900129 against "Nurly-Kus"LLP BIN 090940018639, Ms. Sara Omarova IIN 540509401698, Mr. Oleg Tyo IIN 740624300264;
   - to collect in solidary order from "Nurly-Kus" LLP BIN 080840018639, Ms. Sara Omarova IIN 540509401698, Mr. Oleg Tyo IIN 740624300264 in favour of Private Company "iKapitalist Ltd" BIN 191140900129 the amount of debt in the amount of 40,085,263 KZT (forty million eighty five thousand two hundred sixty three) tenge (89,421 USD), expenses on payment of representative services in the amount of 1,500,000 KZT (one million five hundred thousand) tenge (3,333 USD), expenses on payment of arbitrator's fee in the amount of 1,000,000 KZT (one million) tenge (222,222 USD).

3. The Defendants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendants within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Daniyar Niyazgulov, Director of the Benefits & Partners law firm.

The Defendants were not represented.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 September 2024

CASE No: AIFC-C/CFI/2024/0036

Datamining Technology PTE Ltd.

Claimant

v

Snow Monster Science and Technology Ltd.

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 23 September 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in para 95 of the IAC Arbitration Award dated 27 June 2024 made by Mr. Sergei Vataev, the sole arbitrator appointed by a letter dated 14 November 2023 of Mr. Thomas Krümmel, the Chairman of the AIFC International Arbitration Centre, in IAC Arbitration Case No. 37/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

    1. To recover from the Respondent – Private Company "Snow Monster Science and Technology Ltd." in favour of the Claimant - Private Company "Datamining Technology PTE Ltd." KZT 27,068,000 (twenty-seven million sixty-eight thousand), including:

        - debt in the amount of KZT 13,068,000 under Lease-Agreement-1;
        - debt in the amount of KZT 13,500,000 under Lease-Agreement-2;
        - expenses for the arbitrator's fees in the amount of KZT 500,000.

    2. To order the Respondent – Private Company "Snow Monster Science and Technology Ltd." to return the 363 pieces of equipment under Lease Agreement-1 as specified in the Acceptance Certificate attached to Lease Agreement-1 to the Claimant – Private Company "Datamining Technology PTE Ltd."
    3. To order the Respondent - Private Company "Snow Monster Science and Technology Ltd." to return 450 pieces of equipment under the Lease Agreement-2 specified in Appendix No. 1 to the Lease Agreement-2 to the Claimant – Private Company "Datamining Technology PTE Ltd."
    4. To refuse the Claimant – Private Company "Datamining Technology PTE Ltd." in satisfaction of the claim for cancellation of Lease Agreement-1 and Lease Agreement-2.
    5. To refuse the Claimant – Private Company "Datamining Technology PTE Ltd." in satisfaction of the claim for recovery of the amount of "representative expenses for the services of a lawyer".

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Muktarima Karbanova, Member of Almaty City Bar Association, Almaty, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

9 December 2024

CASE No: AIFC-C/CA/2024/0033

MR MORIEL CARMI

Appellant

v

ASTANA FINANCIAL SERVICES AUTHORITY

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The applications for an extension of time and permission to appeal are dismissed.

REASONS

1. Mr Carmi applies for (1) an extension of time and (2) permission to appeal to the AIFC Court of Appeal ("the CA") from the decision of the AIFC Court of First Instance ("the CFI") dated 24 January 2024 in Case No: AIFC-C/CFI/2023/0024. By that decision the CFI dismissed Mr Carmi's appeal pursuant to section 11(1) of the AIFC Financial Services Framework Regulations from a decision of the Astana Financial Services Authority ("the AFSA").

2. As stated at paragraph 12 of the CFI's judgment, the jurisdiction of the AIFC Court to hear and determine appeals from decisions of the AFSA – the jurisdiction exercised by the CFI in Mr Carmi's case – is conferred by Article 26(5) of the AIFC Court Regulations. Article 26(5) provides:

> "*The Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body, Organisation, or Participant, as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to: (a) a question of law; (b) an allegation of a miscarriage of justice; (c) an issue of procedural fairness; or (d) a matter provided for in or under AIFC law.*
>
> *Decisions of the Court of First instance referred to in this Article 26(5) are final and shall not be subject to further appeal.*"

3. The effect of the final sentence quoted is that the CA has no jurisdiction to entertain an appeal from a decision of the CFI in a case such as this. Consistently with that provision, and underlining the point, Rule 29.49 of the AIFC Court Rules provides: "*No appeal lies from the decision of the Court of First Instance on an appeal … pursuant to the Court Regulations, Article 26(5).*"

4. Where the CA lacks jurisdiction to entertain an appeal, it must also lack jurisdiction to entertain related applications such as an application for permission to appeal or for an extension of time within which to make an application for permission to appeal; and in any event such related applications can serve no useful purpose.

5. Thus, the position in respect of an appeal pursuant to Article 26(5) of the AIFC Court Regulations from a decision of the AFSA is the same in these respects as the position in respect of an appeal pursuant to Article 26(7) of the AIFC Court Regulations from a decision of the AIFC Small Claims Court (as to which, see paragraphs 6-11 of the CA's judgment dated 3 December 2020 in Case No: AIFC-C/CA/2020/0009, *Nursultan Aliyev v Proportunity Management Company Ltd*).

6. It follows that Mr Carmi's applications must be dismissed.

7. Before reaching the present decision, the Court issued directions giving both parties the opportunity to deal with the jurisdictional issue raised by the Court, since it had not been addressed in the original written submissions of either party. In its response the AFSA accepted and submitted that the CA lacked jurisdiction. No response was received from or on behalf of Mr Carmi within the time laid down.

By the Court,

The Rt Hon Sir Stephen Richards

Justice, AIFC Court

Representation:

The Appellant was represented by himself.

The Respondent was represented by Ben Jaffey KC and Grant Kynaston, Blackstone Chambers, London, the United Kingdom.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 September 2024

CASE No: AIFC-C/CFI/2024/0031

Ms. Zhanerke Bakashova

Claimant

Mr. Yergali Dzhuvanyshev

Third Party on the side of the Claimant

v

LLP "Nur Baspana and K"

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Tom Montagu-Smith KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 28 August 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in para 41 of the IAC Arbitration Award dated 28 June 2024 made by Ms. Indira Yeleusizova, the sole arbitrator appointed by a letter dated 4 April 2024 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 10/2024.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   - to terminate the preliminary agreement of sale and purchase of real estate object 4-room apartment, business class № 6 in the townhouse located in the Nur City Residential Complex at the address: Taraz, Bayan Duisenov Street, 166, apartment 6 from 29 September 2021;
   - to recover from LLP “Nur Baspana and K” in favour of Ms. Bakashova Zhanerke KZT 23 356 650 (twenty-three million three hundred and fifty-six thousand six hundred and fifty);
   - to recover from “Nur Baspana and K” LLP in favour of Ms. Bakashova Zhanerke's expenses on payment of representative services KZT 200,000 [two hundred thousand] (USD 432.61);
   - to recover from LLP “Nur Baspana and K” in favour of Ms. Bakashova Zhanerke expenses on payment of arbitration fee KZT 250 000, total KZT 23 806 650 (twenty-three million eight hundred and six thousand six hundred and fifty).

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Asiya Amangeldieva, Advocate of Zhambyl Regional Bar Association.

The Defendants were not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 October 2024

CASE No: AIFC-C/SCC/2024/0030

Private Company "Quantum Capital Ltd"

Claimant

v

Ms. Saniya Gabdullina

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Lord Banner KC

ORDER

1. **Save as set out in paragraph 2 below, the claim is dismissed.**
2. **It is declared that that the Defendant's purported termination of the Agreement in her letter dated 30th January 2024 is ineffective.**
3. **The parties shall bear their own costs.**

JUDGMENT

Introduction

1. By this claim, the Claimant, Quantum Capital Limited (a firm authorised by licence granted on 28 February 2023 by the Astana Financial Services Authority to carry out regulated activities in the AIFC), seeks various remedies against the Defendant, Ms Sanyia Gabdullina, arising out of a contract (Agreement No. 7045/DU, dated 13 December 2021, referred to in this judgment as "**the Agreement"**) pursuant to which the parties agreed that the Claimant would provide asset management services to the Defendant.

2. Clause 16.1 of the Agreement provides that the Agreement *"shall be regulated and interpreted in accordance with the legislation of the Republic of Kazakhstan and relevant legislation of the Astana International Finance Centre (AIFC)".* Clause 16.3 confers jurisdiction on the AIFC Court in relation to any disputes under the Agreement.

3. The financial value of the claim, as stated in the claim form, is 52,622 US Dollars, and therefore the proceedings fall within the remit of the AIFC Small Claims Court (see rule 28.2 of the AIFC Court Rules).

4. Although the central issue in this case is a dispute of fact, neither party has sought a hearing or sought to adduce witness evidence, despite having had ample opportunity to do so. In these circumstances, the Court is satisfied, albeit on balance (given that the factual disagreements between the parties), that the claim can properly be determined on the papers without a hearing.

5. The proceedings were issued following an exchange of pre-action correspondence, the Claimant having sent a Letter Before Claim dated 19 January 2024 and the Defendant having sent a letter in reply dated 30 January 2024. Although the pre-action exchange did not resolve the dispute between the parties, it has helped clarify the issues and the Court commends the parties for engaging in this constructive process before commencing litigation.

The basis of the claim

6. As noted above, pursuant to the Agreement the Claimant was contracted by the Defendant to provide asset management services to her in accordance with the terms of the Agreement. This does not appear to be controversial between the parties. The Court has been provided with a signed copy of the Agreement and has no reason to doubt its authenticity (nor has it been invited to do so by either party).

7. The Court is also satisfied from the evidence provided to it that the Claimant was at all material times in the general business of providing asset management services and did so for multiple clients. It describes itself as *"the largest asset management firm investing in public equities in Kazakhstan"*,[1] albeit the accuracy of that description does not require determination by the Court.

8. Against that background, the Claimant's version of the events that have led to these proceedings is as follows:[2]

    a. On 28 July 2023, the Claimant filed an order via the Exante platform to increase the proportion of Alibaba shares in all the portfolios managed by the Claimant from 2% to 5%.

    b. The Claimant submits, and the Court accepts, that this transaction was made in accordance with Clause 8.1 of the Agreement which entitled the Claimant to *"make a decision to purchase or sell the same Instruments to some clients at the same time to achieve the best results"*.

    c. As a result of the aforementioned transaction, the Defendant's client account with the Defendant stood at 157,681 US Dollars.

    d. The Claimant subsequently discovered that due to what it described as an *"erroneous trade execution"*, their clients' position with Alibaba had exceeded the intended 5% proportion. Immediately upon discovering this, the Claimant (re)sold the excess positions beyond the 5%.

    e. In the process of that resale, the excess in the Defendant's account (referenced AZC2203.001) was mistakenly the subject of a duplicate sale, in place of an intended sale on another account (reference AZC2206.001 in the name of Saifulla Kemalov) which, due to this mistake, remained in excess beyond the intended 5%.

    f. As a result, the Defendant's account received a profit of 52,622 US Dollars and Mr Kemalov's account suffered a loss of 52,525 USD.

9. Relying on Article 8 of the Civil Code of the Republic of Kazakhstan ("**CC RK**"), Claimant contends that the Defendant should *"return the unreasonably received excess profit to compensate for the losses of another client, Kemalov S."* The Claim form seeks the sum of is 52,622 US Dollars for *"unjustly obtained enrichment"* in this respect.

10. Saifulla Kemalov is not, and has not applied to be, a party to these proceedings. Neither the Claimant nor the Defendant has applied to join him as a party.

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[1] Email dated 29 August 2023: see footnote 2 below.

[2] This summary is drawn from the Claim Form, the Claimant's Letter before Claim and an email from the Claimant to Exante dated 29 August 2023 (a copy of which has been provided to the Court, the authenticity of which is not disputed by the Defendant). The Court has also had regard to the supporting documents submitted with the Claim Form.

11. The Claimant further contends that the Defendant terminated the Agreement unilaterally in her letter dated 30 January 2024, which the Claimant says was contrary to Clause 14.1 of the Agreement taken together with Article 401 CCRK. No financial remedy is sought by the claim form in this respect. The Claimant instead askes the Court to *"recognise* [the Defendant] *as having significantly violated the terms of the contract set out in clause 14.1"*.

12. Clause 14.1 of the Agreement provides:

"This Agreement shall come into force from the date of its signing by the Parties and shall remain in force until its termination by either Party with a notification submitted 30 (thirty) dates prior to the expected date of termination."

13. Article 401 CC RK is set out in full in the Claim Form. Its provisions include the following:

1. "*Amendments to and termination of an agreement shall be possible by agreement of the parties, unless it is otherwise stipulated by this Code, other legislative acts and the agreement.*

2. *Upon the claim of one of the parties the agreement may be amended or dissolved upon the decision of the court only as follows:*

    1) *when there is a material violation of the agreement by the other party;*

    2) *in other cases which are stipulated in this Code, other legislative acts or the agreement.*

A violation of the agreement by one of the parties shall be deemed material if it entails for the other party such damage that it to a substantial degree loses something on which it had the right to count when concluding the agreement."

14. The Claimant also relies upon Articles 953 and 954 CC RK. These provide as follows:

"Article 953. Obligation To Return Unjust Enrichment

1. *A person (buyer), who without the legislation or transaction basis purchased or saved property (unjustly enriched) for the account of another person (the victim), shall return to the latter unjustly acquired or saved property, except the cases provided by Article 960 of this Code.*

….

3. *The provisions of this Chapter shall apply, regardless of whether unjust enrichment was the result of the behaviour of the purchaser of the property, the victim or a third party or result of an event.*

Article 954. Correlation Of Requirements For The Return Of Unjust Enrichment With Other Requirements On The Protection Of Civil Rights

Unless otherwise provided by this Code and other legislative acts, and followed from the nature of appropriate relations, the rules of this Chapter shall also apply to the requirements:

1) on the return of the executed, under an invalid transaction;

2) *on the recovery of the property by the owner from the illegal possession of another person;*

3) *one party to another party in the obligation of return of the executed in connection with this obligation;*

4) *for compensation of damages, including the harm, caused by the inequitable conduct of the enriched person."*

The Defendant's case

15. The Defendant's position in response to the claim is set out in her response to the letter before claim, set out in a letter dated 30 January 2023, and in a document filed in response to the Claim Form, which is entitled "Counterclaim" but which is in substance, and which the Court has treated as, a Small Claim Defence within the meaning of Rule 28.12(2) of the AIFC Court Rules (with no actual counterclaim for relief against the Claimant).

16. In essence, the Defendant submits that the Claimant has not demonstrated that there was a mistake that benefited her, that there is no proven causal connection between her profit and Mr Kemalov's loss. In her submission, Mr Kemalov's loss is a result of the Claimant's negligence. She submits that the Claimant is trying to compensate for its liability to Mr Kemalov, and notes that Mr Kemalov (with whom she has no contractual or other legal relationship) is not a party to these proceedings and does not himself claim that the Defendant's profit has resulted in him suffering loss.

The Court's findings

17. The onus of proof in these proceedings is on the Claimant.

18. The Court finds that the Claimant has not discharged that onus of proof. The evidence about the transactions in question is ambiguous at best. There is no clear contemporaneous evidence, the closest to that being an after-the-event email chain between the Claimant and Exante which is of limited probative value as to what happened. The Court is not persuaded, on the evidence provided, that there has been any unjust enrichment within the meaning of Articles 953 and 954 CCRK. The Defendant's submissions in this respect are accepted.

19. Further, and in any event, the Claimant has not demonstrated, to the requisite evidential standard, that it has suffered any loss at the hands of the Defendant. Its case at the very highest is that Mr Kemalov indirectly suffered loss, but there are no legal relations between the Defendant and Mr Kemalov. As noted earlier in this judgment, Mr Kemalov is not a party to these proceedings and neither the Claimant nor the Defendant applied to join him as a party.

20. That leaves the issue of termination. It is plain that the Defendant's letter dated 30 January 2024 did not comply with the terms of Clause 14.1 of the Agreement. Article 401 CC RK reinforces that Clause and does not provide any basis for circumventing it. The purported termination within that letter is therefore ineffective. The Agreement continues to subsist.

21. For these reasons, the claim is dismissed, save to the extent that the Court will make an order that the Defendant's purported termination of the Agreement in her letter dated 30 January 2024 is ineffective.

Costs

22. The Court is satisfied that there is no justification for a departure from the default position under Rule 26.9 of the AIFC Court Rules that parties in proceedings before the AIFC Small Claims Court shall bear their own costs. Neither party's conduct in the proceedings has been unreasonable. Indeed, the parties have constructively engaged in pre-action correspondence and are to be commended for doing so (see paragraph 5 above).

23. Accordingly, each party shall pay their own costs.

By the Court,

The Lord Banner KC

Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Abay Mynbayev, legal consultant, Chamber of Legal Consultants "Centre for Private Legal Consultant", Almaty, Kazakhstan

The Defendant was represented by Ms. Sandi Rakhmanova, attorney, Almaty Regional Bar Association

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 August 2024

CASE No: AIFC-C/CFI/2024/0027

KAZ MED PROM LLP

Claimant

v

BESIR YUSUFOGULLARI- SARE TOPTAN GIDA

Defendant

JUDGMENT AND ORDER

Justice of the Court
The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 14 August 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in Part VIII of the IAC Award dated 5 July 2024 made by Mr. Sergei Vataev, the sole arbitrator appointed by a letter dated 14 November 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 33/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

    1. To recover from Besir Yusufogullari- SARE TOPTAN GIDA in favour of Limited Liability Partnership "Kaz Med Prom" the amount of debt in the amount of USD 601,200 (six hundred and one thousand two hundred), including the principal amount of USD 501,000 (five hundred and one thousand), the amount of penalty in the amount of USD 100,200 (one hundred thousand two hundred), as well as incurred expenses related to arbitration proceedings in the amount of KZT 2,000,000 (two million).

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bagdat Demeu, lawyer, Shymkent, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

21 August 2024

CASE No: AIFC-C/CFI/2024/0026

“BI-ALLIIMRANU” LLP

Claimant

v

"ABS-MUNAI" LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:
The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 14 August 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in para. 32 of the IAC Award dated 2 May 2024 made by Ms. Indira Yeleusizova, the sole arbitrator appointed by a letter dated 23 February 2024 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 8/2024.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

    1. To approve the amicable agreement between ABS-Munai LLP and BI-alliimranu LLP, under the terms of which ABS-Munai LLP and BI-alliimranu LLP agreed that the debt of ABS-Munai LLP to BI-alliimranu LLP under the Facility Security Contract dated 20 March 2021 is the principal debt in the amount of 2 240 000 (two million two hundred and forty thousand) tenge, expenses on payment of arbitration fee 200 000 (two hundred thousand) tenge, the total debt is in the amount of 2 440 000 (two million four hundred and forty thousand) tenge. The Respondent is obliged to pay the debt amount of 2 440 000 (two million four hundred forty thousand) tenge until 31 May 2024.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bazarbay Buranbayev, Director, “BI-alliimranu” LLP, Uralsk, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 November 2024
CASE No: AIFC-C/CFI/2024/0017
CASE No: AIFC-C/CFI/2024/0025

LLP 'TEMIR ZAT'

Claimant

LLP 'BauProjekt'

Claimant

LLP 'MCI Group'

Claimant

v

LLP 'JOINT VENTURE ALAYGYR'

Defendant

JUDGMENT

Justice of the Court:

The Lord Faulks KC

ORDER

The applications are dismissed.

JUDGMENT

1. There are two applications before me this afternoon. They relate to an Arbitration Award issued on 4 March 2024. The Tribunal found against the Claimants, "The Consortium", in their dispute with the Defendant, "Joint Venture "Alaygyr". AIFC Court Case No. 25 of 2024 is an application by the Claimants to set aside the Award. AIFC Court Case No. 17 of 2024 is an application to set aside the execution orders made in connection with the enforcement of the Award by this Court.

2. The Defendant opposes these applications on a number of grounds. It submits that the Claimants relied on the wrong article of the AIFC Arbitration Regulations in making the application to set aside. It says the application is too late and that it is in breach of the AIFC Court Rules, in that there was a failure to give reasons and to provide documents and evidence in support of the application. It is further argued that in the amended application they have in effect put forward a new or additional application outside the relevant time limits.

3. The Claimants' arguments for setting aside the Award and the execution orders is that the Award is invalid, and that the arbitral agreement itself is also invalid. I apprehend that the real reason for the challenge both to the Award and its consequences is apparent from what the Claimants described as the, and I quote the skeleton argument, "illegality, unreasonability and injustice of the Arbitration Award". In the skeleton argument under this heading is set out what in effect is an appeal against the merits of the Tribunal's decision. The Court has no jurisdiction to rule on the merits as the Claimants effectively acknowledged in paragraph 47 of the skeleton argument, which may be why they have been "forced to ask the AIFC Court for an objective assessment of the Arbitration Award and fair intervention in the matter of restoring justice". I make it clear that I reject the arguments based on a challenge of the merits and will go on to consider the Claimants' other arguments.

4. On the face of it an argument that the Award is invalid when the Claimants themselves initiated the arbitration proceedings is unusual. They participated in the proceedings, exchanged statements of case and defence, and never sought to challenge the Tribunal's competence until after the Award had been issued. It is clear and effectively conceded that the AIFC Arbitration Regulations provided the Arbitration Law, and the law of the Republic of Kazakhstan does not in fact govern arbitration proceedings in the AIFC. A number of decisions of this Court have made that clear.

5. I can also see no force in the argument that the Award violates public policy. I find the basis of the public policy argument difficult to understand. It cannot sensibly be argued that it is contrary to public policy to enforce an Award because its enforcement would not be in the interests (presumably financial) of the Republic of Kazakhstan. There is no basis for saying that at various stages consent was not provided by the Claimants to participate in these proceedings. And nor do I understand why enforcement of this award is, in any way, offensive to the main principles of Kazakh Law. I note the normative resolution of the [Constitutional] Court of the Republic of Kazakhstan only recently published makes it clear that arbitration proceedings and respect for such proceedings are entirely consistent with the Constitution.

6. In my judgment, none of the reasons advanced by the Claimants provide any basis for challenging the Arbitration Award. The Tribunal plainly had jurisdiction, even if there was any force in the argument that, as the Claimants say, they were a state entity or quasi-state entity, and there was no jurisdiction.

The Claimants have clearly waived any objections they could have made. In these circumstances, I do not need to consider any of the perfectly respectable and powerful arguments about procedural shortcomings on the Claimants' part. It follows that I will dismiss both applications by the Claimants.

7. The Defendant may make an application for costs **by no later than 17:00 Astana time on Monday 25 November 2024**, and the Claimants may respond within 21 days thereafter.

By the Court,

The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimants were represented by Ms. Vera Marinenko, Partner of LLP "Corporate Expert" Legal Company, Almaty, Republic of Kazakhstan.

The Defendant was represented by Mr. Alexander Korobeinikov, Partner at Baker McKenzie Kazakhstan B.V., Almaty, Kazakhstan.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 November 2024

CASE No: AIFC-C/SCC/2024/0024

AITENOV AZAMAT AMANGELDINOVICH

Claimant

v

PROJECT SI SPC LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Patricia Edwards

Court

ORDER

UPON the commencement of a Claim on 11 July 2024;

AND UPON the making of an Order on 26 August 2024;

AND UPON the provision of further information by both parties;

IT IS ORDERED that:

1. The Defendant shall, by 16:00 Astana time on 22 November 2024, pay to the Claimant 3,717,000 KZT.

2. No order as to costs.

JUDGMENT

1. The Claimant and Defendant entered into a contract, dated 25 July 2022, entitled "Contract # SI-002/001 on Implementation of the Investment project 'Project SI'" ("the Agreement").

2. Relevant provisions of the Agreement included the following:

"1.2 SPC shall invest the money invested by the Investor in real property.

1.3 The Investor shall make Investments in the amount in accordance with Clause 2.1 of this Contract in the Investment Project within two (2) business days from the date of signing this Contract.

1.4 The duration of the Investment Project: 8 months from the date of signing this Contract.

…

2.1 The Investor shall provide financing of the Investment Project in terms of the Investor's Facilities at the expense of its own and/or attracted funds in the amount, at the time of conclusion of this Contract, amounting to eleven million (11,000,000) KZT, which is 25% of the total amount of Investments in the Investment Project.

…

2.2 In case of untimely provision or failure to provide the amount of the Investments, as well as provision of the amount of the Investments in the amount less than specified in Clause 2.1 of this Contract, SPC in accordance with Article 724 of the Civil Code of the Republic of Kazakhstan shall have the right to contest the Investment Contract in accordance with the established procedure, proving that the amount of the Investments was not actually received by it, or was received by it in the amount less than specified in this Contract.

2.3 SPC shall guarantee the return-on-Investment amount in the amount specified in Clause 2.1, in the period from the sixth to the eighth month of the Investment Project implementation period.

…

4.2 When executing this Contract, SPC shall:

4.2.1 Upon expiration of the period specified in Clause 2.3 of this Contract, return the amount of Investment in the manner and within the time limits provided for in this Contract

…

4.3 The return of the received Investment amount shall be performed by SPC in the following order:

4.3.1 no later than three (3) banking days after the expiration of the Investment period specified in Clause 1.4 of this Contract, SPC shall transfer the number of Investments to the Investor's account established in this Contract."

3. As regards jurisdiction, the parties agreed to resolution of disputes by the AIFC Court:

"5.2 For non-fulfilment or improper fulfilment of the terms of this Contract, the Parties shall be liable in accordance with the AIFC Rules "On Contracts" #3 dated December 20, 2017.

…

8.1 This Contract and all legal relations arising therefrom shall be governed by the current Rules of the AIFC.

...

8.3 If it is impossible to resolve disputes through negotiations between the Parties, the Parties shall apply to the AIFC Court for dispute resolution, in accordance with Part 2, Clause 7 of the AIFC Rules "On Contracts"."

4. The Claimant claims 11,000,000 KZT. This is equivalent to approximately US$ 22,315. As this is less than US$150,000, it is appropriate that the claim be determined in the Small Claims Court pursuant to Rule 28.1(1) of the AIFC Court Rules.

5. Pursuant to Clause 1.3 of the agreement, the Claimant agreed to invest 11,000,000 KZT within two business days of the signing of the contract. According to paragraph 13 of the claim, the Claimant made full payment of this sum. It refers to:

"payment orders No. CMT000000697830 dated July 29, 2022 for the amount of 3,540,000 … tenge, an account statement of JSC Halyk Bank of Kazakhstan dated February 10, 2024 for the total amount of 7,441,000 … tenge".

6. The Claimant claims that it has paid the sums due pursuant to the contract but the Defendant has, in breach of contract, failed to return them in the agreed timescale. On 27 October 2023, the Claimant wrote to the Defendant asking for the return of its investment, which it said was due by April 2023. Pursuant to clauses 4.3 and 1.4, the investment was to be returned after a period of eight months.

7. The relevant financial documents attached to the claim are:

(1) Payment order CMT000000562628 dated 15 February 2022, for payment in the amount of 1,664,000 KZT to the Defendant, described as "Payment under the Contract # SI-001/017 dated February 11, 2022".

(2) Payment order CMT000000697830 dated 29 July 2022 for the amount of 3,540,000 KZT, described as "payment under the Contract # SI-002/001 on Implementation of the Investment Project "Project SI" dated July 25, 2022" – i.e. the Agreement.

(3) A bank statement showing a transfer of funds to the Defendant on 2 November 2021 of 5,776,000 KZT. The transaction details describe the purpose as "payment under the Contract SI-001/001 dated October 28, 2021".

(4) The payment of 15 February 2022 (sub-paragraph 1 above) also appears on the same bank statement, with the same contract reference, SI-001/017.

8. The only payment under the Agreement which is evidenced by these documents is the second one listed above, dated 29 July 2022, in the amount of 3,540,000 KZT.

9. No Defence was filed in response to the Claim.

10. By an order dated 26 August 2024, I gave the parties until 6 September 2024 to provide further information about their case, and to file and serve on the other party any further documents, or statements of any witness, on which they intend to rely. I also noted that it was unclear from the documents filed exactly how much money was transferred pursuant to the Agreement, as some of the evidence relied on appeared to show transfers made under other contracts.

11. As the parties had not been given an opportunity to make representations in relation to the Order, it provided that they could apply to have it set aside, varied or stayed within 7 days of service of the Order, in accordance with Rule 3.8.

12. In response, the Claimant filed additional submissions and various further documents. These included several additional contracts but no case has been pleaded in relation to those. Several payment orders were also attached, but these do not evidence any new payments in addition to those listed above.

13. The Defendant filed a short document dated 5 September 2024, stating:

> *"Due to the inconsistency of the arguments presented by the plaintiff in the application, I ask you to cancel Order No. 1 in the AIFC Court case No.24 of 2024. Specified by Mr Aitenov AA the amount of 11,000,000 million tenge was not transferred under agreement SI-002/001."*

14. Insofar as the Defendant appears to have requested to cancel the First Order, this request was made after the deadline in the order, and was in any event unsupported by reasons. In fact, the reasons given by the Defendant appear to amount to its defence to the claim: that the amount specified in the Agreement was not in fact paid by the Claimant.

15. Based on the documents that have been filed in this case, listed above, the Claimant has only proved that 3,540,000 KZT was transferred to the Defendant. As the eight month contractual period has expired, I find that the Defendant is liable to return that sum to the Claimant.

16. The claim raises the possibility of lifting the corporate veil on the basis that the company was used as a sham by its owner, Arman Bayev. The suggestion is that Arman Bayev has used the Defendant to collect funds for his own purposes, and then used the company as a shield to avoid liability to creditors.

17. The short answer to this is that the claim is made against the Defendant only and Arman Bayev is not a party to this litigation. In any event, the corporate veil can only be pierced in very limited circumstances, namely when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control (see the judgment of the UK Supreme Court in *Prest v Petrodel Resources Limited & others* [2013] UKSC 34).

18. The Claimant has relied on the case of *Gilford Motor Co Ltd v Horne* [1933] Ch 935. Mr Horne had been the managing director of the Gilford Motor Co. His contract of employment precluded him being engaged in any competing business in a specified geographical area for five years after the end of his employment. He subsequently formed a company to enable the business to be carried on under his own control but without incurring liability for breach of the covenant. It was found that the company was a "mere cloak or sham" for Mr Horne's dealings. Mr Horne was using the company to evade his personal contractual restriction. In contrast, in the present case, no such pre-existing obligation of Mr Bayev is being evaded. The Agreement was entered into from the outset with the Defendant.

19. The Agreement also contains a penalty provision as follows:

> "5.4. If the payment is overdue for up to 30 days, SPC shall pay the Investor a penalty in the amount of zero-point five percent (0.5%) of the amount of the overdue payment for each day of delay;
>
> 5.5. In case of late payment from 30 to 90 days, SPC shall pay the Investor a penalty in the amount of zero-point five percent (0.5%) of the overdue payment amount for each day of delay, with a one-time fine of five percent (5%) of the Investment amount ...
>
> 5.6. For late repayment of the principal amount of Investments, SPC shall pay the Investor a penalty in the amount of zero-point five percent (0.5%) of the Investment amount for each day of delay."

20. The Claimant claims a 5% penalty amounting to 550,000 KZT. However, I have found that only an investment of 3,540,000 KZT has been evidenced in this case. 5% of that sum amounts to 177,000 KZT and is payable by the Defendant.

21. The claim form mentions suspending the movement of money of the Defendant and Mr Bayev, but no application for a freezing order was made. If the Defendant fails to pay the amounts ordered in this judgment, then the Claimant will be able to seek enforcement in the ordinary way.

22. Accordingly the Defendant is liable to return to the Claimant the sum of 3,540,000 KZT and to pay a penalty of 177,000 KZT.

23. No order as to costs.

By Order of the Court,

Patricia Edwards,
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Mr. Rauan Dairbekov, Redbrick Law Firm LLP, Almaty, Republic of Kazakhstan, and Mr. Dairbekov Nurzhan, Redbrick Law Firm LLP, Almaty, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

28 August 2024

CASE No: AIFC-C/CFI/2024/0023

Joint Stock Company "Center for Ground-based Space Infrastructure"

Claimant

v

Joint Stock Company Kazakh-Russian Joint Venture "Baiterek"

Defendant

JUDGMENT

Justice of the Court:
Justice Tom Montagu-Smith KC

ORDER

UPON the Order of Justice the Rt. Hon. The Lord Faulks KC dated 8 November 2022 ("the Order").

AND UPON the Order of Justice Sir Stephen Richards dated 5 May 2023 granting permission to appeal against the Order to allow the parties to discuss settlement.

AND UPON the parties reaching a settlement agreement on 26 June 2024 ("the Settlement Agreement") in full and final settlement of the action and of the appeal.

AND UPON the parties asking the Court to set aside the Order and approve the Settlement Agreement.

BY CONSENT IT IS ORDERED THAT:

1. The Order is set aside.

2. The settlement set out in the Settlement Agreement is approved. All further proceedings in the claim shall be terminated upon the terms set out in the Settlement Agreement, save for the purpose of carrying such terms into effect.

3. Save as set out above, there shall be no order on the appeal.

By the Court,

Tom Montagu-Smith KC
Justice, the AIFC Court

Representation:

The Claimant was represented by Mr Nikolay Nestechuk, General Director of the Joint Stock Company Center for Ground-based Space Infrastructure, the Russian Federation.

The Defendant was represented by Mr Aidin Aimbetov, Chairman of the Board of the Joint Stock Company Kazakh-Russian Joint Venture "Baiterek", Republic of Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

12 July 2024

CASE No: AIFC-C/CFI/2024/0022

Private Company "GoCrowd Limited"

Claimant

v

(1) "Best advertising company" Limited Liability Partnership

(2) Sagindykova Fariza Mukhamediyaevna

Defendants

JUDGMENT AND ORDER

Justice of the Court:
The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 11 July 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in part VII of the IAC Award dated 1 July 2024 made by Ms. Snezhana Kutsenko, the sole arbitrator appointed by a letter dated 23 February 2024 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 6/2024.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

    1. To foreclose the share of the founder Ms. Fariza Sagindykova in "Best advertising company" LLP within the framework of the enforcement inscription №04881-003256/379 from 1 September 2023, in the amount of debt 25,427,037 (twenty-five million four hundred twenty-seven thousand thirty-seven) tenge.

    2. To recover in solidary order from Ms. Fariza Sagindykova, "Best advertising company" LLP in favor of the Private company «GoCrowd Limited» the amount of 300,000 (three hundred thousand) tenge for payment of arbitrator's fee, expenses for the translator in the amount of 120,000 (one hundred twenty thousand) tenge.

3. The Defendants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Alpamys Alpys, Chief Executive Officer, Private Company “GoCrowd Limited”, Astana, Republic of Kazakhstan.

The Defendants were not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 October 2024

CASE No: AIFC-C/SCC/2024/0021

MR SULTANBEK ABILOVICH OTEGENOV

Claimant

v

(1) NEF QAZAQSTAN LIMITED LIABILITY PARTNERSHIP
(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.Ş. JOINT STOCK COMPANY

Defendants

JUDGMENT

Justice of the Court:

Justice Josephine Higgs KC

JUDGMENT

This Judgment is structured as follows:

PART 1. INTRODUCTION

1.1. The Claimant, Mr Sultanabek Abilovich Otegenov, commenced a claim against NEF Qazaqstan LLP (the "**First Defendant**" or the "**Issuer**")) and Timur Gayrimenkul Geliştirme Yapi ve Yatirim A.Ş. JSC (the "**Second Defendant**" or the "**Guarantor**") (collectively the "**Defendants**"), by submitting a Claim Form to the AIFC Court which was received by the Court on 4 July 2024, and issued by the Court on 9 July 2024.

1.2. In his Claim Form the Claimant claims, in summary, repayment of matured bonds KZX000001805 (the "**Bonds**") issued by the First Defendant and guaranteed by the Second Defendant, together with interest and costs.

1.3. On 6 August 2024, the First Defendant filed a Defence. In its Defence, the First Defendant acknowledged the debt owed to the Claimant, specifically it acknowledged a principal debt of USD 69,995.11, USD 900.79 interest, and interest for failure to pay an amount in the sum of USD 2,659.32. The First Defendant informed the Court and the Claimant that it offered to repay the principal amount to the bondholders of US denominated bonds KZX000001805 and KZT denominated bonds KZX000001185, conditional upon the bondholders having no claims and agreeing not to make any future claims against the First Defendant or the Second Defendant. It stated that should these terms be refused, the Issuer would not be able to make any payments and any subsequent appeals and claims should be directed to the Guarantor.

1.4. No Defence has been filed by or on behalf of the Second Defendant.

1.5. By an email dated 27 August 2024, the Court asked the Claimant to confirm whether he wished to accept the offer made in the Defence, or wished the Court to proceed to determine the claim and issue Judgment. The email noted that if the Claimant wished the Court to determine the Claim it would be determined by the Court on the papers, without a hearing, unless either the Claimant or the Defendants requested a hearing.

1.6. By an email to the Registry dated 24 September 2024, the Claimant informed the AIFC Court that he wished the Court to proceed to determine the claim and issue its Judgment.

Jurisdiction of the AIFC Small Claims Court and applicable law

1.7. In the Claim Form, it is stated the AIFC Court has jurisdiction over the Claimant's claims against the Defendants based on the prospectus for the Bonds prepared by the Issuer (the "**Prospectus**"), which is exhibited at Exhibit 3 to the Claim Form.

1.8. The Prospectus in Clause 2.1 on pages 27-28 provides as follows:

"*The Bonds and any non-contractual obligations, arising out of, or in connection with, the Bonds shall be governed by, and construed in accordance with the laws of the AIFC.*

The Issuer has agreed herein the conditions in favor of the Bondholders that any claim, dispute or discrepancy of any nature arising out of, or in connection with the Bonds (including claims, disputes or discrepancies regarding the existence, termination thereof, or any non-contractual obligations arising out of, or in connection with the Bonds) shall be brought to, and finally resolved by the Court of the AIFC in accordance with the rules thereof".

1.9. The Prospectus on pages 41-60 contains the "Schedule 3 Guarantee Agreement" dated 28 October 2022 between the Guarantor and the Issuer in favour of the bondholders (the "**Guarantee**").

1.10. The Guarantee on page 59-60 in Art. 19 "Jurisdiction", as amended by an "Additional Agreement no 1" dated 7 November 2023, includes the following jurisdictional clause:

"*The Parties consent to the exclusive jurisdiction of the AIFC Court for the purpose of any action or proceeding hereunder. For the purpose of this paragraph, 'Acting Law of the AIFC" has the meaning as defined in Article 4 of the Constitutional Statue of the Republic of Kazakhstan on the Astana Internation No. No 438-V ZRK of 7 December 2015".*

1.11. The Claimant alleges that, as a result of these provisions, the AIFC Court has jurisdiction over his claims against the First Defendant and the Second Defendant arising in relation to the Bonds. The AIFC Court's jurisdiction is not disputed in the Defence, and neither of the Defendants has made an application contesting the jurisdiction.

1.12. The Court is satisfied that the AIFC Small Claims Court has jurisdiction over the Claimant's claims, for the reasons set out above.

1.13. The Claimant alleges that the dispute is governed by AIFC law, since both the Prospectus and Guarantee provide that AIFC law is the applicable law. This is not disputed in the Defence, and the Court is satisfied that AIFC law is applicable.

1.14. None of the parties has requested a hearing. Accordingly, pursuant to Rule 28.39 of the AIFC Court Rules, the Court has considered this Claim on the papers and determines it as follows.

PART 2. FACTS GIVING RISE TO THE CLAIMANT'S CLAIMS

2.1 The Claimant alleges the following facts and matters in his Claim Form. None of these facts is disputed by the First Defendant in its Defence.

2.2 The First Claimant invested USD 69,955.11 in Bonds KZ000001805 (NEF. 1125) and acquired 698 Bonds. This investment is evidenced by the Customer Order exhibited at Exhibit 4 of the Claim Form.

2.3 The maturity date for the Bonds is 20 November 2025 with an interest rate of 10 % per annum payable on a semi-annual basis.

2.4 The First Defendant also issued other bonds No. KZX000001185 (NEF.1123). However, on 30 November 2023, the First Defendant admitted its default on bonds No. KZX000001185 (NEF.1123) [**Exhibit 5**]. The First Defendant announced that it defaulted in paying the principal amount and the last coupon payment to the bondholders of bonds No. KZX000001185 (NEF.1123).

2.5 By section 4.4(1) of the Prospectus in relation to the Bonds, the Issuer undertook to:
"*prevent the facts of non-fulfillment of obligations not related to the Issue of bonds of the Issuer by more than ten percent of the total value of the assets of the Issuer as of the date of state registration of the issues of bonds*." [**Exhibit 3**].

2.6 The default on bonds No. KZX000001185 (NEF.1123) amounted to the breach of other obligations in relations to the Bonds under the Prospectus (i.e. Bonds No. KZX000001805 (NEF.1125)) and entitled the Claimant to demand early redemption of his Bonds.

2.7 Shortly after on 30 December 2023, the First Defendant admitted default in the form of "Breach of other obligations (Covenants)" on the Bonds as well and confirmed bondholders' entitlement for the early redemption of Bonds **[Exhibit 2]**:

"*Consequently [of default under bonds No. KZX000001185], the Company announces that 'Breach of other obligations (Covenants)' under section 4.5(a) of the Prospectus occurred and from 31 December 2023, the KZX000001805 (NEF.1125) Bondholders shall be entitled to send the notice requesting the Company to early redeem the KZX000001805 (NEF.1125) bonds or take other action as set out in the Prospectus. The sample of such notice is attached hereto as Annex A*."

2.8. Section 4.5(a) of the Prospectus provides as follows:

"*4.5 Events of Default*
If any one or more of the below events (each an "Event of Default") shall occur, the Bondholder may give written notice to the Issuer at its registered office that such Bonds are immediately repurchased, at its principal amount together with accrued interest (if any) to the date of payment.
(a) Breach of other obligations (Covenants)"

2.9. In the event of default, the Prospectus on p. 34 entitles the bondholders with the right of early redemption of the Bonds under the condition that bondholders send written claims to the Issuer for the redemption of Bonds within 7 days following the first publication of information on default.

2.10. The Claimant sent the required written notice on 4 January 2024 ("**Notice**") to the Defendants' email addresses [**Exhibit 6**]. Moreover, the Claimant handed over the Notice to the Issuer's office and received a receipt confirmation signature from the Issuer's employee [**Exhibit 7**].

2.11. As at the date of the Claim Form, the Issuer had not performed its obligations to the Claimant.

2.12. The Claimant alleges that he is entitled to the payment of the principal debt with interest, and that the Guarantor and the Issuer are jointly liable for this payment. As explained below, there is no dispute regarding the Issuer's liability for repayment of the principal debt and interest.

PART 3. CLAIM AGAINST THE FIRST DEFENDANT

3.1. There is no dispute that the First Defendant became liable to repay the principal debt to the Claimant. As recorded in paragraph 1.3 above, in its Defence, the First Defendant acknowledges its debt to the Claimant, in the total amount of USD 73,515.22.

3.2. Based on the allegations made in, and the documents exhibited to, the Claim Form, the First Defendant's admission in its Defence, I find that the First Defendant owed the First Claimant the sum of USD 73,515.22 as at 3 July 2024.

3.3. Since that date, further interest has accrued. Based on the interest rate of 7.7% set out in paragraph 33 of the Claim Form, the further interest which has accrued by the date of this judgment (23 October 2024) is USD 1,674.14.

3.4. Accordingly, I find that the First Defendant owes the Claimant the sum of USD 75,189.36.

PART 4. CLAIM AGAINST THE SECOND DEFENDANT

4.1. The Claimant contends that, having established the Issuer's liability, the Claimant may jointly demand performance from the Guarantor. He refers to Article 5.1 "Execution and Delivery of Guarantee" and contends that Guarantee Trigger Events have occurred. He further alleges that the Guarantor has admitted its obligations to the Claimant in a statement dated 12 December 2023, which is exhibited at Exhibit 9 to the Claim Form.

4.2. The Defence filed by the First Defendant does not dispute the Claimant's assertions and asserts that the Second Defendant is jointly and severally liable for the obligations arising from the Bonds.

4.3. The Second Defendant has not filed a Defence.

4.4. Based on the allegations made in the Claim Form, and the documents exhibited to the Claim Form, I am satisfied and I find that the Guarantor is jointly and severally liable for the non-fulfilment of the Issuer's obligations.

4.5. I therefore find that the total amount owed to the Claimant by the Second Defendant as at the date of this Judgment is USD 75,189.36.

PART 5. COSTS

5.1. In his Claim Form, the Claimant also seeks attorney's fees. Rule 26.9 of the AIFC Court Rules provides that the Small Claims Court may not order a party to pay a sum to another party in respect of costs, fees and expenses except for such part of any Court fees as the Small Claims Court considers appropriate, or such further costs as the Small Claims Court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.

5.2. I consider that it is appropriate that the Defendants should pay the Claimant's Court fee in the sum of USD 350.91.

5.3. I do not have any information about any other costs incurred by the Claimant, and I do not consider it appropriate to order the Defendants to pay any other costs. However, the Claimant is permitted, if so advised, to file a written statement of costs setting out the amounts claimed and brief grounds on which costs are sought within 28 days of the date of this Judgment. The Defendants are permitted, if so advised, to file any response within 28 days thereafter. I will then determine the Claimant's claim for costs on the papers.

PART 6. CONCLUSION

6.1. For the reasons set out above, THE COURT ORDERS THE FIRST DEFENDANT AND SECOND DEFENDANT TO PAY THE SUM OF USD 75,540.27 WITHIN 28 DAYS FROM TODAY'S DATE.

By Order of the Court,

Josephine Higgs KC,
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Partner, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The First Defendant was represented by Mr. Rauan Batykov, ILF A&A Limited Liability Partnership, Almaty, Republic of Kazakhstan.

The Second Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

27 June 2024

CASE No: AIFC-C/CFI/2024/0020

Private Company InvestRoom Ltd

Claimant

v

Limited Liability Partnership "Et product"

Defendant

Mr. Yerkenai Makhanov

Defendant

Mr. Olzhas Kapizov

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 26 June 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in Part VIII of the IAC Arbitration Award dated 14 April 2024 made by Mr. Sergei Vataev the sole arbitrator appointed by a letter dated 3 October 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in the IAC Case No. 31 of 2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   To recover from the Respondent – "Et product" Limited Liability Partnership in favour of the Claimant – Private Company InvestRoom Ltd. The amount of KZT 12,030,800 (twelve million thirty thousand eight hundred), including:
   – KZT 5,000,000 as outstanding principal under Loan Agreement-1;
   – KZT 6,000,000 as outstanding principal under Loan Agreement-2;
   – KZT 500,000 as the penalty under the Loan Agreement-1;
   – KZT 250,000 as the fine under the Loan Agreement-1;
   – KZT 280,800 to reimburse the expenses associated with the arbitration proceedings.

3. The Defendants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Defendants within that period has been finally disposed of, whichever is the later.

By the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Nursultan Aliyev, KazBar legal consultants chamber.

The Defendants were not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

18 October 2024

CASE No: AIFC-C/CFI/2024/0019

SIA RESTCOM GROUP

Claimant

v

(1) BALKHASHPOLYMETALL LLP

and

(2) POLYMETTECH LLP

Defendants

COSTS ORDER

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The Claimant (SIA Restcom Group) is ordered to pay to the Second Defendant (Polymettech LLP) its costs in the total sum of six million eight hundred and thirty one thousand five hundred tenge (KZT 6,831,500).

REASONS

1. At the conclusion of the substantive judgment in this case, dated 12 September 2024, the Court directed that any application by the Defendants for costs be made in writing within 14 days and that the Claimant might respond within 14 days thereafter. An application for costs was subsequently made by the Second Defendant alone. No response was received from the Claimant. This decision on the application is made on the papers, in line with the approach taken in the substantive judgment with the assent of the parties.

2. The costs sought by the Second Defendant consist of KZT 6,770,000 in legal fees of the attorney representing the Second Defendant in the Court, and KZT 61,500 for the notary certifying the translation of relevant documents, making a total of KZT 6,831,500.

3. I am satisfied that this is an appropriate case for the payment of costs. The general rule under Rule 26.5 of the AIFC Court Rules is that the unsuccessful party will be ordered to pay the costs of the successful party. There is no reason to make a different order here. The Second Defendant, as the successful party, is therefore entitled to costs.

4. On the basis of my knowledge of the case and the materials before me, I am in a position to make an immediate assessment of costs under Rule 26.13.

5. The amounts claimed by the Second Defendant are supported by verifying documents. I am satisfied, in the terms of Rule 26.11, that such costs were reasonably and necessarily incurred and were proportionate to the matters in issue.

6. Accordingly, the Claimant is ordered to pay the Second Defendant's costs in full.

By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant was not represented.

The First Defendant was not represented.

The Second Defendant was represented by Ms. Gulmira Abenova, Attorney at law, Republic of Kazakhstan.

IN THE COURT OF FIRST INSTANCE OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

12 September 2024

CASE No: AIFC-C/CFI/2024/0019

SIA RESTCOM GROUP

Claimant

v

(1) BALKHASHPOLYMETALL LLP

and

(2) POLYMETTECH LLP

Defendants

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The claim is dismissed.

JUDGMENT

1. By a judgment dated 7 February 2024 in Case No: AIFC-C/CFI/2024/0007 the AIFC Court of First Instance ("the CFI") allowed an application by Polymettech LLP to recognise and enforce measures set forth in an IAC Arbitration Award dated 24 January 2024 and made in an IAC arbitration between Polymettech and BalkhashPolymetall LLP ("the Award"). The CFI made an order ("the CFI Order") in the following terms:

> "that [Polymettech] is entitled:
>
> 1) to foreclose on immovable property, namely a land plot with cadastral No. 22:329:039:252, located at the address of Shymkent City, Yenbekshinsky district, Kapal Batyr Street, z. Ontustik Industriyaldy, building 30 (RK0201300740953802), on account of debt repayment in the amount of 239 312 640,95 (two hundred thirty-nine million three hundred twelve thousand six hundred forty point ninety-five hundredths) tenge;
>
> 2) to recover from "BalkhashPolymetall" LLP in favour of "Polymettech" LLP in addition to the amount of debt the funds in the amount of 1 000 000 (one million) tenge, as well as the costs associated with arbitration proceedings in the amount of 6 007 816 (six million seven thousand eight hundred and sixteen) tenge."

2. By a Claim Form issued on 31 May 2024 the Claimant, SIA Restcom Group, seeks an order to "cancel", i.e. to set aside, the CFI Order and the Award, although it was not a party either to the arbitration in which the Award was made or to the court proceedings in which the CFI Order was made. BalkhashPolymetall is named as First Defendant to the claim, and Polymettech is named as Second Defendant.

3. All three parties to the present proceedings have filed written pleadings (Claim Form and Statements of Defence) and further written submissions (including responses to the Court's directions, SIA Restcom Group's Objections to the Defendants' Statements of Defence, and Polymettech's Supplementary Arguments). Documents relied on have been annexed to the various pleadings and submissions. None of the parties has offered witness evidence to the Court. The Claimant has requested that the case be decided on the papers. Both Defendants have assented to that course. With some hesitation, I have concluded that the case can appropriately be dealt with in that way and I have therefore proceeded to a decision on the papers.

The factual history

4. BalkhashPolymetall is a subsidiary of Dala Minerals LLP. Another subsidiary of Dala Minerals that features in the case is Shymkent Smelting LLP.

5. Polymettech was first registered on 29 March 2023. On first registration the participants in it were BalkhashPolymetall and ASIAGREENTECH LLP (also a subsidiary of Dala Minerals), holding respectively 95% and 5% of the shares. On 10 August 2023, BalkhashPolymetall's shares were sold to SIRT LLP; and on 9 September 2023, ASIAGREENTECH's shares were sold to Glometech LLP. Dala Minerals LLP holds a 100% interest in SIRT but only a 10% interest in Glometech: the remaining 90% is held by Astera Industry LLP, which has no relationship with Dala Minerals or its relevant subsidiaries. In summary, however, through these various links Polymettech and BalkhashPolymetall have been affiliated companies at all material times.

6. SIA Restcom Group and certain other companies whose interests it represents (Restcom Holding Corp., Restcom Investment Limited, and Hong Kong New Age Trading Co. Limited) made a number of longterm loans to BalkhashPolymetall and Shymkent Smelting, repayable by 31 December 2022. Those loans were not repaid when the repayment period expired. Judgments were subsequently obtained as follows against BalkhashPolymetall in the Specialized Interdistrict Economic Court of Astana City, as confirmed and/or enlarged by decisions of the Judicial Chamber for Civil Cases of the Astana City Court, in the period 30 May 2023 to 19 March 2024: (1) for KZT 218,796,588 in favour of SIA Restcom Group; (2) for KZT 586,392,138 and an additional KZT 395,311,409 in favour of SIA Restcom Group and Restcom Investment Limited; and (3) for KZT 132,621,840 in favour of Restcom Holding Corp. and Hong Kong New Age Trading Co. Limited, together with an additional KZT 45,702,847 in favour of Restcom Holding Corp. and further sums of KZT 811,658 and KZT 1,395,435 by way of penalty and costs. Of those judgments, only the first had been enforced as at the date of the present claim. The remainder, amounting in total to over KZT 1 billion, had yet to be effectively enforced. In addition, there were said to be a number of contracts for which claims had not yet been filed. The total debt of BalkhashPolymetall and Shymkent Smelting to SIA Restcom Group and the companies it represents was said to be in excess of KZT 3 billion.

7. SIA Restcom Group contends that BalkhashPolymetall and related companies, including Polymettech in particular, have been acting illegally to prevent effective enforcement of those debts and evade their payment obligations.

8. Polymettech says that it has never had any contractual relations with SIA Restcom Group and has never been a debtor of that company. It claims to be a creditor of BalkhashPolymetall on a par with SIA Restcom Group and that it has acted legitimately in its relevant dealings with BalkhashPolymetall.

9. The history of dealings between the parties, including various steps taken towards enforcement of debts, is detailed and of some complexity. It does not need to be set out in full. What follows concentrates on elements of central relevance in the history leading to the Award and the CFI Order. Reference is made to matters as they appear on the face of the documents filed in this Court. Issues raised by SIA Restcom Group as to the motivation, authenticity and validity of transactions described are considered later.

10. It is convenient to start with two agreements that were entered into shortly after Polymettech was established:

    (1) a deed of guarantee dated 4 April 2023 between Eco IL Group BV and Polymettech under which Polymettech assumed a full several and joint liability to Eco for the proper

performance by BalkhashPolymetall of each and all obligations under a specified sale contract of 6 March 2023 between Eco and BalkhashPolymetall (clause 1.1), and which provided that, in the event of Polymettech having to perform the obligations under the sale contract, all Eco's receivables from BalkhashPolymetall were to pass to Polymettech to the extent that it satisfied Eco's claims (clause 1.6); and

(2) an agreement of the same date between Polymettech and BalkhashPolymetall confirming the signature and effect of the deed of guarantee and committing BalkhashPolymetall to reimburse Polymettech for any and all expenses incurred by it in connection with the performance of the obligations under the sale contract.

11. On 14 August 2023 Polymettech sent BalkhashPolymetall a letter of claim which referred to the terms and effect of the deed of guarantee and stated that Polymettech had performed the obligations of BalkhashPolymetall to Eco under the guarantee in a total amount equivalent to KZT 426,447,196.36. It requested payment of that sum by 21 August 2023. BalkhashPolymetall replied by letter dated 16 August 2023, acknowledging its debt to Polymettech in that sum and committing to repay the debt by 25 August 2023. In support of its entitlement to payment of that sum, Polymettech refers to the terms of the deed of guarantee and agreement of 4 April 2023 and also to Article 334.1 of the Kazakhstan Civil Code, which provides that "The guarantor who executed the obligation shall acquire all the rights of the creditor under that obligation … in the amount in which the guarantor satisfied the claim of the creditor. The guarantor shall also have the right to claim from the debtor the payment of damages and interest … in the amount paid to the creditor ….".

12. Upon BalkhashPolymetall failing to pay the sum in question by 25 August 2023, Polymettech applied to a notary for an "executive endorsement" for recovery of the debt. Such an endorsement (also referred to in the English translations of the documents before this Court as an "executive inscription") is a formal measure governed by Articles 92.1 ff. of the Kazakhstan Law on Notaries of 14 July 1997 that enables proceedings to be brought for enforcement of a debt. An executive endorsement in favour of Polymettech was made on 5 September 2023 by Notary Z.A. Myassnikova and entered into the register under number 4886 ("Executive Endorsement No.4886").

13. In proceedings brought by SIA Restcom Group against BalkhashPolymetall and Polymettech, Executive Endorsement No.4886 was subsequently found to be illegal and unenforceable, and monies recovered under it were ordered to be returned. That decision, however, postdated the Award and the CFI Order. The reasons for it and the consequences of it are examined later in this judgment. In the meantime, the factual history up to and including the Award and the CFI Order is continued by reference to events in the order in which they occurred.

14. On 26 September 2023, Executive Endorsement No.4886 was served on a bailiff who secured recovery of KZT 47,200,000 from BalkhashPolymetall through enforcement proceedings on the basis of the endorsement.

15. An apparent dispute over the procedures for enforcement in respect of the balance was then referred to mediation. This resulted in a Mediation Settlement Agreement dated 19 October 2023 between Polymettech and BalkhashPolymetall under clause 6 of which the parties acknowledged and agreed

that, so far as relevant: (1) BalkhashPolymetall owed Polymettech KZT 426,793,921.36 (namely KZT 426,447,196.36 principal and KZT 346,725 expenses) pursuant to Executive Endorsement No.4886, of which KZT 47,200,000 had been recovered; (2) Polymettech, for its part, owed KZT 142,281,280.41 to BalkhashPolymetall; (3) the parties' mutual liabilities were to be set off in compliance with Article 370 of the Kazakhstan Civil Code; (4) upon such offsetting, BalkhashPolymetall still owed Polymettech KZT 239,312,640.95, which BalkhashPolymetall committed to pay by 31 October 2023; (5) in the event of failure to pay that debt, BalkhashPolymetall would transfer to Polymettech on 1 November 2023 its title to the land plot as later described in the CFI Order quoted at paragraph 1 above ("the Land Plot"), at a market value confirmed by an independent appraiser; and (6) upon such transfer, BalkhashPolymetall's debt was to be deemed to be discharged, either fully or partially, depending on the transfer value of the transferred property. The agreement further provided, by clause 7, that all disputes and differences arising between the parties under or in connection with the agreement were to be referred to the International Arbitration Centre (the IAC) of the AIFC.

16. BalkhashPolymetall failed to pay the sum remaining due in accordance with the Mediation Settlement Agreement or to transfer the Land Plot in the event of non-payment as required by that agreement. Thereupon, by a request dated 14 November 2023, Polymettech commenced arbitration proceedings in the IAC to enforce BalkhashPolymetall's obligations under the agreement. The proceedings were contested by BalkhashPolymetall but the claim was found by the tribunal to be established in full. The tribunal made an award dated 24 January 2024 (the Award) in identical terms to those quoted in the CFI Order dated 7 February 2024 enforcing the Award (see again paragraph 1 above). The CFI Order was itself made on an application by Polymettech to the AIFC Court pursuant to Article 45 of the AIFC Arbitration Regulations.

17. The Land Plot had at one time been the property of AMIR-A LLP but ownership passed to Shymkent Smelting under a sale and purchase contract concluded on 16 March 2017. Ownership then passed from Shymkent Smelting to BalkhashPolymetall under a sale and purchase contract concluded between them on 15 June 2021. By a decision dated 20 February 2024 in proceedings brought by AMIR-A against Shymkent Smelting and BalkhashPolymetall, the Specialized Interdistrict Economic Court of Shymkent City held that the contracts of sale and purchase between AMIR-A and Shymkent Smelting and between Shymkent Smelting and BalkhashPolymetall were invalid, and obliged BalkhashPolymetall to return the Land Plot to AMIR-A. That decision was, however, reversed by a ruling dated 28 May 2024 of the Judicial Chamber for Civil Cases of the Shymkent City Court.

18. The basis of the finding of the court of first instance that the sales of the Land Plot were invalid was a finding by a Kazakhstan criminal court, upheld on appeal, that the head of AMIR-A had executed minutes of a general meeting without the consent of the LLP's participants and had forged a signature on a document approving the transaction. In reversing the decision of the court of first instance, the Judicial Chamber held that AMIR-A could be compensated by other means, e.g. by recovering the value of the Land Plot from the guilty party, and that since BalkhashPolymetall had purchased the property for its market value there were no grounds for invalidating the disputed transactions.

19. The resulting position, therefore, was that BalkhashPolymetall was the lawful owner of the Land Plot at the time of the IAC arbitration proceedings between it and Polymettech.

The invalidity of Executive Endorsement No.4886

20. On or about 12 October 2023 SIA Restcom Group brought a claim in the Specialized Interdistrict Economic Court of Shymkent City against BalkhashPolymetall and Polymettech for a ruling that Executive Endorsement No.4886 and another executive endorsement on the basis of which enforcement proceedings had been initiated were invalid and unenforceable. By a decision dated 29 January 2024 the claim was denied. The decision was, however, reversed on appeal by a ruling dated 13 May 2024 of the Judicial Chamber for Civil Cases of the Shymkent City Court. That ruling, in turn, was challenged by Polymettech in proceedings seeking cassation review before the Supreme Court of the Republic of Kazakhstan. By a decision dated 22 July 2024 a Judge of the Supreme Court refused to transfer the petition for review for consideration at a court session of the Judicial Board for Civil Cases of the Supreme Court. The ruling dated 13 May 2024 of the Judicial Chamber for Civil Cases of the Shymkent City Court was thereby upheld.

21. Although the Judge of the Supreme Court summarised and endorsed the basis on which the Judicial Chamber of the Shymkent Court had ruled in favour of SIA Restcom Group, it is preferable to refer to the fuller reasoning set out in the ruling of the Judicial Chamber itself. In disagreeing with the decision of the first instance court, the ruling stated (in the English translation provided to this Court):

> "So, the court of the first instance did not take into account the fact that Balkhash Polymetall LLP has accounts payable to the plaintiff in the present case in the amount of 1 606 558 996 KZT, and all the actions of the defendants to commit the disputed writ of execution are aimed at avoiding the fulfilment of obligations to the plaintiff, by withdrawing assets to the accounts of Polymettech LLP.
>
> ….
>
> Furthermore, the court of first instance did not take into account the plaintiff's arguments that the sole founder of Balkhash Polymetall LLP is Dala Minerals LLP, which in turn is the parent company for Glometech LLP and Sirt LLP – companies – participants of Polymettech LLP.
>
> ….
>
> Thus, there is objective confirmation of the fact that the debtor and the recoverer, being affiliated legal entities, applied for the writ of execution not for the purpose of actually receiving funds, but for their possible withdrawal, which is confirmed by the above-mentioned circumstances.
>
> At the same time, the judicial board takes into account the arguments of the plaintiff with reference to the fact that such actions of the defendants are not isolated … [Various matters in 2022 and 2023 are then referred to.]
>
> Under such objective circumstances the judicial board comes to the conclusion that the court of first instance was incorrectly defined and clarified the range of circumstances essential to the case, which actually indicate the need to satisfy the plaintiff's claims, due to the evidence and validity.
>
> In reaching such conclusions, the judicial board takes into account the circumstances that the debtor and the recoverer have not presented evidence of the need to provide material assistance under previous agreements, as well as the existence of the recoverer's accounts payable to the debtor at the time of providing material assistance. …."

22. The formal ruling of the Judicial Chamber provided for the setting aside of the decision of the lower court and the making of a new decision which included the following:

> "To recognise [Executive Endorsement No.4886] as illegal and unenforceable and to bring the parties to the initial position, obliging Polymettech LLP to return to BalkhashPolymetall LLP the amount of 29,431,572 (twenty-nine million four hundred thirty-one thousand five hundred seventy-two) KZT, recovered under [Executive Endorsement No.4886]. ….
>
> The ruling shall enter into legal force from the date of its announcement. …."

The challenge to the Award and CFI Order: legal framework

23. Article 44 of the AIFC Arbitration Regulations 2017 provides:

> **"44. Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award made in the seat of the AIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) Such application may only be made to the AIFC Court. An arbitral award may be set aside by the AIFC Court only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the AIFC;
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case;
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …;
>
> (iv) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties …; or
>
> (b) the AIFC Court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under AIFC law; or
>
> (ii) the award is in conflict with the public policy of the Republic of Kazakhstan.
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or such longer period

> as the parties to the arbitration have agreed in writing, or, if a request had been made under Article 43 [Correction and interpretation of award; additional award], from the date on which that request had been disposed of by the arbitral tribunal. ….”

24. It may well be that the only persons entitled to apply to the AIFC Court pursuant to those provisions are parties to the IAC arbitration in which the award in question was made. Article 44(2)(a) refers in terms to “the party making the application”. Although the wording of Article 44(2)(b) is not limited in its terms to a finding by the Court on an application by a party to the arbitration, the time-limit provisions in Article 44(3) are again expressed in terms that contemplate only an application by such a party. The provisions on Rules 27.35 to 27.37 of the AIFC Court Rules likewise appear to contemplate that an application to set aside an award can be made only by a party to the arbitration.

25. Similarly, a judgment or order of the AIFC Court itself is open to challenge in the ordinary course only by a party to the proceedings in which the judgment or order was made. An exception is to be found in Rule 24.14 of the AIFC Court Rules which provides:

> “24.14 A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.”

Although that rule is expressed in relatively wide terms, the scope for successful reliance on it by a non-party is likely to be very limited in practice, as is suggested by the operation of the identically worded Rule 40.9 of the Civil Procedure Rules of England and Wales. The point is particularly acute in relation to a judgment or order made on an application pursuant to a provision restricting those entitled to apply (in this case, as referred to above, an apparent limitation to parties to the relevant arbitration).

26. For present purposes, however, I will assume (without deciding) that those procedural obstacles can be overcome and I will concentrate on the substantive grounds on which SIA Restcom Group seeks to have the Award and CFI Order set aside.

The issues: discussion

27. SIA Restcom Group contends that the actions of BalkhashPolymetall and Polymettech in the history of dealings described above and culminating in the obtaining of the Award and the CFI Order have pursued one single goal, namely the withdrawal of property from BalkhashPolymetall in order to prevent the enforcement of the decisions of the Kazakhstan courts of general jurisdiction. It is submitted that this Court should set aside the Award pursuant to Article 44(2)(b)(ii) of the AIFC Arbitration Regulations, on the basis of a finding that the Award is thereby in conflict with the public policy of the Republic of Kazakhstan.

28. I note that Article 42(2)(b)(ii) is the only provision of Article 44 of the AIFC Arbitration Regulations with which SIA Restcom Group engages in its submissions, and I am satisfied that it would have no case under any of the other provisions of Article 44. I can therefore concentrate on the alleged conflict with the public policy of the Republic of Kazakhstan.

29. There is a strong argument that BalkhashPolymetall and Polymettech have been acting with the aim of avoiding the enforcement of judgments against BalkhashPolymetall. A finding to that effect was a

central element in the courts' decision that Executive Endorsement No.4886 was invalid and unenforceable (paragraphs 20-21 above). The fact that Polymettech was established by BalkhashPolymetall (with a substantial share capital) at about the time when SIA Restcom Group first commenced litigation to recover the debts that BalkhashPolymetall owed to it and the other companies whose interests it represents, and against a background in which the intention to recover those debts had been clearly signalled, adds grounds for suspicion about the motivation for the dealings between these affiliated companies. I also view as doubtful an assertion by Polymettech that until recently it was not aware of the existence of SIA Restcom Group or of that company's status as a creditor of BalkhashPolymetall or of the attempt to recover certain debts from BalkhashPolymetall through judicial proceedings. I am not in a position, however, to make factual findings about such matters on the basis of the material before the Court and without much fuller factual investigation. The same applies, for example, to an assertion by BalkhashPolymetall that the various enforcement proceedings and related steps taken by SIA Restcom Group are part of an attempt by that company to take over BalkhashPolymetall's business, rather than simply an attempt to recover debts owed by it – an assertion that SIA Restcom Group seeks to rebut by referring *inter alia* to the fact that one of its applications is an application for a declaration of bankruptcy against BalkhashPolymetall.

30. In any event, I do not think that findings by this Court as to the parties' motivation in taking the various steps they did can be determinative of the issues before the Court. What really matters, in my view, is the validity of the transactions that led to the IAC arbitration and that underlie the Award, and the extent, if any, to which reliance on those transactions is to be regarded as inconsistent with decisions of the Kazakhstan courts of general jurisdiction, so as to give rise to a situation arguably engaging the public policy provision of Article 44(2)(b)(ii) of the AIFC Arbitration Regulations. The fact, if established, that the steps were taken with a view to preventing enforcement of the decisions of those courts would not be sufficient in itself, in my view, to justify a finding of conflict with the public policy of the Republic of Kazakhstan.

31. As to the validity of the relevant transactions, one needs to go back to the Eco deed of guarantee dated 4 April 2023 and the agreement of the same date between BalkhashPolymetall and Polymettech (paragraph 10 above). There has been no challenge to those agreements, let alone a finding of invalidity, in the general courts of Kazakhstan. There has been nothing to deprive the agreements of full force and effect, with the debts arising under them remaining enforceable. The agreements themselves have been put in evidence before this Court. SIA Restcom Group makes the point that the sales contract referred to in the deed of guarantee was not produced subsequently to the notary or in court or arbitration proceedings, that there are no documents confirming delivery of goods thereunder, and no evidence of the performance by Polymettech of its monetary obligations to Eco. But there is simply no basis in the evidence before this Court for finding that the agreements were anything other than genuine agreements or that the obligations said to have been performed by Polymettech were not in fact performed. Among other points raised by SIA Restcom Group are that the parties were not entitled to conclude the certificate of completion dated 14 August 2023 (paragraph 11 above) under the accounting rules of the Republic of Kazakhstan, or to include value added tax under the country's tax legislation. These and other such points would have to be resolved in the country's general courts. As it is, I see no proper ground for treating the agreements as invalid or for declining to treat the debts arising under them as debts open in principle to enforcement.

32. That brings me to Executive Endorsement No.4886. In that case there is a clear ruling by the general courts that the endorsement was invalid and unenforceable (see paragraphs 18-20 above). The effect of that ruling was not, however, to extinguish the debt that was sought to be enforced through the executive endorsement but to invalidate the endorsement as a means of enforcement of the debt. The debt itself had accrued in pursuance of the Eco deed of guarantee and agreement of the same date between BalkhashPolymetall and Polymettech, and specifically as a result of Polymettech's discharge of obligations on behalf of BalkhashPolymetall under the Eco deed of guarantee. It was a debt claimed and acknowledged in the exchanges dated 14 August 2023 and 21 August 2023 (see again paragraph 11 above). It did not arise out of the executive endorsement and it was not extinguished, retrospectively or at all, by the invalidation of the endorsement. It remained in existence.

33. At the time, long before the decision of the Judicial Chamber for Civil Cases of the Shymkent City Court ruling Executive Endorsement No.4886 to be invalid or the decision of the Supreme Court upholding that ruling, recovery of part of the debt was secured by a bailiff on the basis of the endorsement (see paragraph 14 above) but the balance was then dealt with by the Mediation Settlement Agreement dated 19 October 2023. The Mediation Settlement Agreement is another agreement to which there has been no challenge, let alone a finding of invalidity, in the general courts of Kazakhstan. Again, the agreement had full force and effect. It involved what was on its face a lawful set-off of mutual liabilities, an undertaking by BalkhashPolymetall to pay the amount still owed to Polymettech upon such offsetting, and an undertaking to transfer the Land Plot to Polymettech in the event of failure to pay that debt by the agreed date. It included a valid arbitration clause whereby all disputes and differences under or in connection with the agreement were to be referred to the IAC: the parties were fully entitled to choose the IAC as the forum for resolving any such disputes or differences. Although the agreement referred to BalkhashPolymetall's obligation to repay its debt in pursuance of Executive Endorsement No.4886, the true position, as described above, is that the debt arose out of the earlier agreements and did not depend upon the validity of the endorsement. The subsequent ruling that the endorsement was invalid and unenforceable did not negative or invalidate the Mediation Settlement Agreement or the inclusion of BalkhashPolymetall's debt within the agreement.

34. SIA Restcom Group contends further that BalkhashPolymetall violated the law, namely Article 21 of the Kazakhstan Civil Procedure Code, by signing the Mediation Settlement Agreement. It relies for that contention on an order issued on 17 October 2023 (two days before the date of the agreement) by the Specialized Interdistrict Economic Court of Astana in connection with a claim filed by it for debt recovery. The court ruled (in the English translation provided to this Court): "To seize movable and immovable property belonging to BalkhashPolymetall Limited Liability Partnership … wherever it is located and in what it is not expressed, as well as cash in bank accounts in the amount sufficient to satisfy the claim, but not more than 760,049,612 (seven hundred sixty million forty-nine thousand six hundred and twelve) KZT", with various specified exceptions. Article 21.2 of the Civil Procedure Code, headed "Binding power of court rulings" provides that legally effective court orders and other acts "shall be binding for all state authorities, local government authorities, legal entities, officials, citizens and shall be subject to enforcement in the whole territory of the Republic of Kazakhstan"; and Article 21.3 provides that "Failure to enforce court acts as well as other disrespect towards court shall entail responsibility provided for by law". It is said that as of the date of the order there was no money or other movable property on the account of BalkhashPolymetall, and that BalkhashPolymetall had no right to issue any obligations in respect of its sole property, namely the Land Plot, or to give any

permission for its transfer, since there was an unsecured court ruling for a much larger amount than the value of the property.

35. It does not seem to me, however, that the terms of the court order of 17 October 2023 prevented BalkhashPolymetall from engaging in the exercise set out in the Mediation Settlement Agreement, namely the acknowledgement and set-off of existing liabilities, an agreement as to the time for payment of the balance, and an agreement as to what was to happen (transfer of the Land Plot) in the event of non-payment within that period. So far as I am aware, there has been no finding by the Kazakhstan courts of general jurisdiction that BalkhashPolymetall acted in breach of the order by entering into the agreement, nor even any proceedings before those courts in which such a contention is advanced. Accordingly, I do not accept that the court order of 17 October 2023 had the effect of invalidating the Mediation Settlement Agreement or that it provided a reason why the IAC's reliance on that agreement in making the Award should be held to have been in conflict with the public policy of the Republic of Kazakhstan.

36. It follows from the above that the IAC was entitled to treat the Mediation Settlement Agreement as a valid agreement and to give effect to the parties' obligations under it, both on the basis of matters as they stood at the time of the arbitration and in the light of subsequent court decisions. Moreover, the Award itself did not contradict or involve inconsistency with any decisions of the Kazakhstan courts of general jurisdiction. Even if such a contradiction or inconsistency were a proper basis for finding a conflict with the public policy of the Republic of Kazakhstan, within the meaning of Article 44(2)(b)(ii) of the AIFC Arbitration Regulations, no such conflict would arise in this case.

37. I should mention finally that the execution of the CFI Order has itself given rise to a dispute. On 12 March 2024 bailiff T.A. Makhashev, who was responsible for the execution of that order, instructed two other bailiffs to lift an "arrest" (an encumbrance) that had been placed on the Land Plot in the course of enforcement proceedings in respect of debts due to SIA Restcom Group and Restcom Investment Limited. In a decision dated 6 May 2024 the Specialized Interdistrict Administrative Court of Shymkent City held that the instruction was unlawful as being in breach of the Administrative Procedural Code of the Republic of Kazakhstan, for reasons that included failure to obtain the written consent of the claimants and to ensure a fair balance of the interests of the parties. The decision serves to illustrate the point that enforcement procedures are subject to the relevant laws of, and subject to supervision by the general courts of, the Republic of Kazakhstan. But it tells one nothing about the validity of the CFI Order, which is simply cited as one of the decisions the enforcement of which had given rise to the dispute.

Conclusion

38. For the reasons given above, I conclude that the claim by SIA Restcom Group for the setting aside of the CFI Order and the Award must be dismissed. It is not necessary in the circumstances to reach a decision on the procedural issues identified in paragraphs 23-26 above.

39. Any consequential application by BalkhashPolymetall or Polymettech for costs must be made in writing, with supporting information, within 14 days of the date of this decision, and SIA Restcom Group may respond within 14 days thereafter. The Court's decision on any such application will be made on the papers.

By the Court,

The Rt. Hon. Sir Stephen Richards Justice,

AIFC Court

Representation:

The Claimant was represented by Ms. Ainagul Zhumagulova, Attorney, a member of the Bar Association of Astana City, Republic of Kazakhstan.

The First Defendant was represented by Mr. Dmitriy Chumakov, Attorney at law, Republic of Kazakhstan.

The Second Defendant was represented by Ms. Gulmira Abenova, Attorney at law, Republic of Kazakhstan.

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

28 August 2024

CASE No: AIFC-C/CFI/2024/0018

MICHAEL WILSON & PARTNERS, LIMITED

Applicant

v

(1) CJSC KAZSUBTON
(2) KAZPHOSPHATE LLP
(3) KAZPHOSPHATE LIMITED

Respondents

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. **The application for an oral renewal of the application for permission to appeal and ancillary relief is refused.**
2. **Costs reserved.**

JUDGMENT

1. By proceedings in Case No. AIFC-C/CFI/2023/0002 the present Applicant, Michael Wilson & Partners, Limited, sought orders from the AIFC Court recognising and enforcing judgments given by the English High Court against the First and Second Respondents and/or judgments given by a Netherlands Court recognising and granting permission to enforce those English judgments. For reasons given in a judgment dated 26 September 2023 the AIFC Court of First Instance ("the CFI") declared that the Court had no jurisdiction to entertain those proceedings and ordered that the Claim Form be set aside and the proceedings be dismissed as against all three Respondents. By a separate judgment, dated 31 October 2023, the CFI made a consequential order for costs in favour of the Second and Third Respondents. Both judgments were given by the then Chief Justice of the Court, The Rt Hon The Lord Mance, following an *inter partes* procedure.

2. The Applicant applied to the AIFC Court of Appeal ("the CA") for permission to appeal against those decisions, together with ancillary relief. By a judgment and order dated 31 January 2024 in Case No. AIFC-C/CA/2023/0040, the CA refused the application. The application was determined on paper in accordance with the normal rule under Rule 29.16 of the AIFC Court Rules. The Court did not direct an oral hearing pursuant to the exception in Rule 29.17 because, as stated in §3 of its judgment, it was satisfied that the application could be fairly determined on paper without an oral hearing, so that an oral hearing was not required by the rule; and, as was implicit, it decided against directing an oral hearing in the exercise of its residual discretion under the rule.

3. By the present application the Applicant seeks an "oral renewal" of its application for permission to appeal and ancillary relief. The Second Respondent and the Third Respondent have filed written submissions in opposition to the application. In accordance with the Court's directions, the Applicant has filed written submissions in response to the Second Respondent's contentions on the issue addressed in this judgment.

4. The application for an oral renewal is misconceived. Contrary to the Applicant's submissions, there is no right to an oral renewal or oral hearing of an application for permission to appeal following refusal of the application on paper. The relevant AIFC Court Rules are clear in their terms:

> "29.16 An application for permission to appeal not made orally to the lower Court at the hearing *will be determined on paper, except as provided for by Rule 29.17*.
>
> 29.17 The judge considering the application on paper may direct that the application be determined at an oral hearing, and shall so direct if the judge is of the opinion that the application cannot be fairly determined on paper without an oral hearing" (emphasis added).

In the absence of a direction under Rule 29.17 by the judge considering the application on paper, there is no right to an oral hearing of the application. And where the application has been refused on paper, the Rules do not allow an oral renewal of it.

5. The Applicant seeks to pray in aid the Civil Procedure Rules for England and Wales, arguing that they make provision for an oral renewal of an application for permission to appeal following a refusal on paper. The point is a bad one. Rule 52.5(1)-(2) of the Civil Procedure Rules, together with paragraph 15(1) of Practice Direction 52C, contains provisions concerning the determination of applications for permission to appeal to the England and Wales *Court of Appeal* which are materially identical to Rules 29.16-29.17 of the AIFC Court Rules. There, too, the Rules do not allow an oral renewal of an application refused on paper. The position under the Civil Procedure Rules is different in respect of applications for permission to appeal to the *County Court* and *High Court*. In those cases, where permission is refused on paper, the person seeking permission may request the decision to be reconsidered at an oral hearing: see Rule 52.4(1)-(2), together with paragraph 7.2 of Practice Direction 52B. The Applicant's submissions rely on those provisions but they have no application to appeals to the England and Wales Court of Appeal, where the relevant position, giving no right of oral renewal of an application refused on paper, is as stated above and has been so since at least 2016. The AIFC Court Rules use the same language as adopted by the Civil Procedure Rules in relation to appeals to the England and Wales Court of Appeal and have the same effect. The absence of a right of oral renewal is plainly the result of a deliberate drafting decision and, contrary to the Applicant's submission, there is no lacuna in the Rules.

6. The Applicant also refers to Rule 23.8(3)-(4) of the Civil Procedure Rules, which provide for an oral hearing of an application in certain circumstances. Those provisions, however, are displaced by the specific, mandatory language of Rule 52.5 in relation to applications for permission to appeal to the Court of Appeal. Nor do the provisions have any direct equivalent in the AIFC Court Rules.

7. The application for a stay is intimately connected to the application for permission to appeal and can have no independent life once the application for permission to appeal has been refused.

8. The Applicant also refers to the jurisdiction recognised by the Court of Appeal in *Taylor v Lawrence* [2002] EWCA Civ 909 and now given effect in Rule 52.30 of the Civil Procedure Rules, to reopen a final determination of an appeal or of an application for permission to appeal in exceptional circumstances. The exercise of the jurisdiction in England and Wales is subject to stringent conditions, including that a final determination will not be reopened unless it is necessary to do so in order to avoid real injustice, the circumstances are exceptional and make it appropriate to reopen the matter, and there is no alternative effective remedy (Rule 52.30(1)). Moreover, permission is needed to make an application under the rule and there is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs (Rule 52.30(4)-(5)). Even if the AIFC Court were to recognise a similar jurisdiction (on which the AIFC Court Rules are silent) and were to lay down similar procedural requirements, the fact is that the application now before the Court is not a *Taylor v Lawrence* application; if it were, there would be no right to an oral hearing of it unless, exceptionally, the judge so directed; and the application would stand no realistic chance of being granted permission since the case gets nowhere near to meeting the substantive conditions for exercising the jurisdiction. That includes a contention that the Third Respondent and its lawyers misled the Court, in that new information shows that the Third Respondent has a BIN (Business Identification Number) in Kazakhstan and is therefore, as the submission

goes, subject to the jurisdiction of the AIFC. The relevance of the BIN is disputed by the Third Respondent but in any event the point does not undermine the CFI's reasoning as regards the erroneous joinder of the Third Respondent in the proceedings or as regards the core jurisdictional issue decided by the Court. In short, the Applicant's reliance on *Taylor v Lawrence* does not give any support to the Applicant's case that it is entitled to an oral renewal of its application for permission to appeal following refusal of permission on paper.

9. In the circumstances it is unnecessary and inappropriate to deal here with the issues that the Applicant states would be raised at an oral renewal hearing.

10. It is also unnecessary to say anything further about the points raised in the defence submissions of the Respondents, including an application by the Third Respondent under Rule 8.1 of the AIFC Court Rules for an order that the AIFC Court does not have jurisdiction over it – an application which concentrates mistakenly on the underlying jurisdictional issues between the parties rather than on the immediately relevant question of oral renewal of the application for permission to appeal.

11. Although the Applicant's present application has been given a separate case number administratively, and the case number contains a "CFI" designation rather than a "CA" designation, the application is in substance incidental to the application for permission to appeal that was the subject of the CA's decision in Case No. AIFC-C/CA/2023/0040. It is an application calling for decision by the CA, not by the CFI, and as an incident of that previous case. It has been treated accordingly in this judgment.

12. The application notice requests that the resolution of the present application be by oral hearing rather than on paper. The Court takes the view, however, that the application should be determined on paper without an oral hearing, and the Court has proceeded accordingly. By Rule 6.21 of the AIFC Court Rules the Court may deal with an application without a hearing if the Court does not consider that a hearing would be desirable. The Court does not consider that a hearing would be desirable in this case. A hearing is unnecessary, given the clear absence of a right of oral renewal of an application for permission to appeal following refusal of the application on paper. To hold a hearing of the application for oral renewal would also tend to go behind the Court's previous decision that the application for permission to appeal could be fairly determined without a hearing. Moreover, determining the present application on paper gives effect to the overriding objective in Rule 1.6 of the AIFC Court Rules, having regard in particular to Rule 1.6(3) ("ensuring that the case is dealt with expeditiously and effectively, using no more resources than are necessary") and Rule 1.6(4) (proportionality). Even in the absence of the express provision in Rule 6.21, the exercise of the Court's general powers of case management under Rule 3.1 would be relied upon to produce the same result.

13. For those reasons the Applicant's application for an oral renewal of the application for permission to appeal and ancillary relief is refused.

14. The submissions of the Second Respondent and the Third Respondent contain applications for costs. The Court's decision on costs is reserved. The Second Respondent and the Third Respondent may file information as to the amount of costs claimed within 14 days of the date of this decision. The Applicant may respond by way of written submissions on the principle and amount of costs within 14 days thereafter.

By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Appellant was represented by Mr. Michael Wilson, Partner, Michael Wilson & Partners, Limited.

The First Respondent was not represented.

The Second Respondent was represented by Mr. Bakhyt Tukulov, Partner, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The Third Respondent was represented by Ms. Dinara Nurgazy, Associate, Kinstellar LLP, Almaty, Republic of Kazakhstan.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

30 May 2024
CASE No: AIFC-C/CFI/2024/0017

LLP 'TEMIR ZAT'

Claimant

LLP 'BauProjekt'

Claimant

LLP 'MCI Group'

Claimant

v

LLP 'JOINT VENTURE ALAYGYR'

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 22 May 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in Part VIII of the IAC Arbitration Award dated 4 March 2024 made by the panel of arbitrators (the presiding arbitrator – Dr. Jaroslaw Turlukovski appointed by a letter dated 8 June 2023, arbitrator on behalf of the Claimant – Mr. Arman Shaikenov appointed by the letter dated 9 February 2023, and arbitrator on behalf of the Respondent – Mr. Dmitriy Bratus appointed by the letter dated 9 February 2023) appointed by Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in the IAC Case No. 29 of 2022.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

255. The Arbitral Tribunal decided on the Counterclaim:

1) The Defendant's claim against the Claimant in a Counterclaim for joint recovery from the Claimant in favor of the Defendant KZT2 976 865 619.88 of the advance payment not fully reimbursed for the unperformed work on the preparation of design and estimate documentation and unfulfilled construction and installation work under the Contract, satisfy.
2) The Defendant's claim against the Claimant in a Counterclaim for the joint recovery from the Claimant in favor of the Defendant KZT1 155 880 320 of the advance payment not fully reimbursed for undelivered technological equipment under the Contract, satisfy.
3) In satisfying the Defendant's claim against the Claimant in a Counterclaim for joint recovery from the Claimant in favor of the Defendant KZT7 171 896 000 penalty for delay in the performance of work under the Contract, refuse.
4) In satisfying the Defendant's claim to the Claimant in a Counterclaim for the joint recovery from the Claimant in favor of the Defendant KZT1 812 000 000 fine for termination of the Contract due to the fault of the Claimant, refuse.
5) The Defendant's claim against the Claimant in a Counterclaim for a joint recovery from the Claimant in favor of the Defendant KZT16 414 353.60 as compensation for the costs of conducting a technical audit, satisfy.
6) The Defendant's claim against the Claimant in a Counterclaim for a joint recovery from the Claimant in favor of the Defendant KZT39 200 000 against reimbursement of expenses for the conservation of the construction object, satisfy.
7) The Defendant's claim against the Claimant in a Counterclaim for joint recovery from the Claimant in favor of the Defendant KZT1 881 522 844 against reimbursement of expenses for correcting defects committed by the Claimant, satisfy.
8) The Defendant's claim against the Claimant in a Counterclaim for joint recovery from the Claimant in favor of the Defendant KZT1 631 219.13 to reimburse the expenses for electricity consumed by the Claimant, satisfy.
9) In satisfying the Defendant's claim against the Claimant in a Counterclaim for joint recovery from the Claimant in favor of the Defendant KZT96 141 024 inconsideration of reimbursement of expenses for the involvement of a legal consultant, refuse.
10) The Defendant's claim against the Claimant in a Counterclaim for recognition of the Defendant's rights (claims) under subcontract and equipment supply agreements, including warranty obligations, satisfy.

The Defendant's claim against the Claimant in a Counterclaim for the joint recovery from the Claimant in favor of the Defendant of the expenses for the payment of the arbitrators' fee in the Case to satisfy to the extent, to recover from the Claimants jointly in favor of the Defendant KZT15 103 576.72.

3. The Claimants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the Claimants within that period has been finally disposed of, whichever is the later.

By the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimants were not represented.

The Defendant was represented by Mr. Alexander Korobeinikov, Partner at Baker McKenzie Kazakhstan B.V., Almaty, Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

29 August 2024

CASE No: AIFC-C/CFI/2024/0016

MR KANAT SAGYNAEV

Claimant

v

(1) NEF QAZAQSTAN LIMITED LIABILITY PARTNERSHIP

(2) TIMUR GAYRIMENKUL GELIŞTIRME YAPI VE YATIRIM A.Ş.

Defendants

JUDGMENT

Justice of the Court

Justice Tom Montagu-Smith KC

ORDER

1. Judgment is entered against the First Defendant on the admissions made in paragraph 1 of the First Defendant's Defence in the terms set out below.

2. Judgment in default is entered against the Second Defendant in the terms set out below.

3. The Defendants shall pay the Claimant the sum of US$ 259,530.80 (KZT 124,891,412).

4. The Defendants shall pay the Claimant's costs of the proceedings, summarily assessed in the amount of US$ 7,000 (KZT 3,368,540).

REASONS

1. By this claim, the Claimant seek payment of US$ 259,530.80 (KZT 124,891,412) due in respect of certain bonds issued by the First Defendant and guaranteed by the Second Defendant.

2. The Claimant issued the claim on 30 May 2024. On 20 June 2024, he filed a certificate of service indicating that he had served the proceedings on both Defendants.

3. The First Defendant acknowledged service on 25 June 2024. The Second Defendant has not done so.

4. The First Defendant did not immediately file a Defence. On 9 July 2024, the Claimant applied for default judgment against both Defendants. On the following day, 10 July 2024, the First Defendant filed a Defence.

5. The Defence appeared to admit the substance of the claim. As a result, I made directions requiring the Claimant and the First Defendant to exchange submissions on whether and in what terms the Court should enter judgment on the admissions and on costs. The Claimant's submissions were due on 8 August 2024, the First Defendant's on 15 August 2024.

6. On 8 August 2024, the Claimant filed submissions, seeking judgment on the admissions in the Defence. On 15 August 2024, the First Defendant emailed the Court, attaching a document labelled "Defence". It offered no submissions on whether there should be judgment on the admissions, nor on costs.

<u>The position of the First Defendant</u>

7. The relevant Court Rules are as follows:

> *10.3 Where a party makes an admission under Rule 10.1 (admission by notice in writing), any other party may apply for judgment on the admission.*
>
> *10.4 Judgment entered under Rule 10.3 shall be such as it appears to the Court that the applicant is entitled to on the admission.*

8. Paragraph 1 of the First Defendant's Defence reads as follows:

> *"In this Defence, Defendant 1 acknowledges the debt owed to the Claimant, specifically USD 249,985.14 as the principal debt. Defendant 1 also acknowledges the debt of USD 3,218.97*

as interest. Interest for failure to pay an amount is also acknowledged in the amount of USD 6,353.69. Therefore, the total amount of the debt of Defendant 1 is USD 259,530.8."

9. As the Claimant points out, the First Defendant admits that it is liable to pay the Claimant the full amount claimed. The First Defendant goes on in the Defence to suggest that it is currently unable to make the payment and is prioritizing repayment of other bond debts. However, even if that is correct, it would not amount to a defence to the claim.

10. The Defendant's submissions of 15 August 2024 offered no reasons why judgment should not be entered.

11. In the circumstances, it appears to me that the Claimant is entitled to judgment against the First Defendant for the full amount of the claim.

The position of the Second Defendant

12. Under AIFC Court Rule 9.4:

> *9.4 The Claimant may obtain judgment in default of an acknowledgment of service if —*
>
> *(1) the Defendant has not filed an acknowledgment of service or a Defence to the claim (or any part of the claim); and*
>
> *(2) the relevant time for doing so has expired.*

13. In his Certificate of Service, the Claimant states that he served the proceedings on the Second Defendant on 3 June 2024. If so, the time for the Second Defendant to file an acknowledgment of service was 28 days later (Rule 7.4(2)), by 1 July 2024, and so has now expired. The only question is therefore whether the Second Defendant has been validly served.

14. Rule 5.3 of the AIFC Court Rules permits service "by any method which brings the document and its contents to the attention of the party being served."

15. The Claimant says that he served the proceedings by email to info@nef.com.tr. This was the email address provided in the prospectus for the bonds to be used for contacting the Second Defendant. In the circumstances, I am satisfied that the proceedings were brought to the Second Defendant's attention.

16. My view is fortified by the terms of the First Defendant's submission of 15 August 2024. In paragraph 3 of that document, the First Defendant offered to repay the principal sum due on the bonds, on condition that the Claimant did not pursue any further claims for penalties, fines or legal fees against either Defendant. The First Defendant's lawyers appear to consider themselves authorized to make an offer on behalf of the Second Defendant. In the circumstances, it appears highly likely that they have discussed these proceedings with the Second Defendant.

17. In the circumstances, I am satisfied for present purposes that the time for the Second Defendant to file an acknowledgment of service has expired and it has not done so. The Claimant is therefore entitled to default judgment against the Second Defendant.

18. The Defendants' liability to the Claimant is joint and several and not cumulative.

19. It remains open to the Second Defendant to apply to set aside this judgment, insofar as it affect the Second Defendant, in accordance with Part 9, Section II of the AIFC Court Rules.

Costs

20. The Claimant seeks costs in the sum of US$ 7,050 (KZT 3,392,601).

21. There can be no doubt that the Claimant should be entitled to his costs in principle.

22. As to quantum, the Claimant has provided a breakdown of the time spent by the three lawyers acting on his behalf, together with their hourly rates. The total comes to US$ 7,050 (KZT 3,392,601), representing 43.5 hours of lawyer time. I note that, by annex 1 to the Engagement Letter, the Claimant agreed to pay a fixed fee of US$ 7,000 (KZT 3,368,540) for representation in these proceedings. On the present material, it therefore appears that the Claimant's maximum liability to his lawyers is US$ 7,000 (KZT 3,368,540) and his claim should not therefore exceed that sum.

23. The sum claimed is, in my view, entirely reasonable. This is reinforced by the fact that the sum due was fixed and the work required could have been significantly greater had the Defendants defended the claim. The First Defendant has not provided any comments on the quantum.

24. In the circumstances, I assess the Claimant's costs at US$ 7,000 (KZT 3,368,540).

By Order of the Court,

Tom Montagu-Smith KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Partner, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The First Defendant was represented by Mr. Rauan Batykov, Associate Partner at the International Law Firm ILF A&A, Almaty, Republic of Kazakhstan.

The Second Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 May 2024

CASE No: AIFC-C/CFI/2024/0015

Private Company "iKapitalist Ltd"

Claimant

v

(1) "ABN ALYANS" LLP,

(2) Nurlan Rysbekov,

(3) Bazarkul Aidarov

Defendants

JUDGMENT AND ORDER

Justice of the Court:
The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 3 May 2024 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in part VII of the IAC Award dated 4 March 2024 made by Ms. Snezhana Kutsenko, the sole arbitrator appointed by a letter dated 7 December 2023 of Mr. Thomas Krümmel, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 39/2023.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   To collect in solidary order from "ABN ALYANS" LLP BIN 190340018634, Mr. Nurlan Rysbekov IIN 670520350498, Mr. Bazarkul Aidarov IIN 700118301797 in favour of Private Company “iKapitalist Ltd” BIN 191140900129 the amount of debt 191 163 659 (one hundred ninety-one million one hundred sixty-three thousand six hundred fifty-nine thousand) tenge (398 756.4 $), the amount of penalty for failure to provide reports in the amount of 146,300 (one hundred forty-six thousand three hundred) tenge ($305.1), the amount of expenses on payment of representative’s services in the amount of 2000 000 (two million) tenge ($4171.8), expenses on payment of arbitrator’s fee in the amount of 1,000,000 (one million) tenge ($2,085.9).

3. The Defendants are given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

4. This Order shall not be enforced (a) until after the end of the period set out in paragraph 3 above or (b) until after any application made by the defendant within that period has been finally disposed of, whichever is the later.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Daniyar Niyazgulov, Director of Benefits & Partners law firm, Astana, Republic of Kazakhstan.

The Defendants were not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

30 May 2024

CASE No: AIFC-C/CFI/2024/0014

MR KANAT ALIMOV

Claimant/Appellant

v

ASTANA FINANCIAL SERVICES AUTHORITY

Defendant/Respondent

ORDER

Justice of the Court:

Justice Sir Stephen Richards

ORDER

UPON the Claimant/Appellant filing a “Waiver of Claim”, and by agreement between the parties,

IT IS ORDERED THAT the claim be discontinued.

By the Court,

The Rt. Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant/Appellant was represented by himself.

The Defendant/Respondent was represented by Mr Ben Jaffey KC, Blackstone Chambers.

IN THE COURT OF APPEAL
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 December 2024
CASE No: AIFC-C/CA/2024/0013

ALAGUZOVA ASSEMGUL AMANGELDIYEVNA

Claimant/Appellant

v

BAGAZAT AMANTAY

Defendant/Respondent

JUDGMENT

Justice of the Court:

The Lord Faulks KC

ORDER

1. **The Defendant shall forthwith return the car, namely a Lexus brand car, model LS 460, registration number 686AIG01, colour black, year of manufacture 2007, body JTHGL,46F675010214, to the Claimant.**

2. **The Defendant do pay to the Claimant a penalty in the sum of 240,945 Tenge, AIFC court fee in the sum of 32,500 Tenge, expenses in the sum of 350,000 Tenge and for translation services the sum of 55,00 Tenge. These sums shall be paid within 14 days of the Order reflecting my decision.**

JUDGMENT

1. This is an appeal against the judgment of AIFC Judge Charles Banner KC in Case No: AIFC-C/SCC/2023/0045, dated 15 February 2024.

2. He gave judgment for the Clamant in the sum of 7,348,445 Tenge (comprising contractual damages of 6,700,000 Tenge, together with a penalty of 240,945 Tenge and costs of 437,500 Tenge). However, he declined to make an Order requiring the Defendant to transfer the car (the subject of the dispute) back to the Claimant.

3. The Claimant sought permission to appeal from this court and I gave permission to appeal on the basis that there were real prospects of an appeal succeeding.

4. The Defendant has failed to pay any of the sums owing to the Claimant in connection with the transfer of the car. Nor has he engaged with the court in either in relation to the claim or in relation to this appeal.

5. It is clear from the terms of the Mediation Settlement Agreement that title to the car would not pass until the agreed sale price was paid. In fact, none of the instalments agreed have been paid by the Defendant. In these circumstances the car remains the property of the Claimant.

6. The judgment of Judge Charles Banner KC accurately summarised the issues and I do not disagree with any of his findings or conclusions except as to his refusal to make an order transferring the car back to the Claimant.

7. It seems likely that the Defendant will not pay any of the sums owing by him in connection with the transfer of the car, and if she cannot recover physical possession of the car, the Claimant will thus have parted with the car and received nothing in return.

8. In the circumstances, I am satisfied that an Order for the return of the car is entirely consistent with the Civil Code of the Republic of Kazakhstan and with the Overriding Objective as provided by AIFC Court Rule 1.6.

9. I therefore allow this appeal, and vary the judgment below.

10. The Defendant shall forthwith return the car, namely a Lexus brand car, model LS 460, registration number 686AIG01, colour black, year of manufacture 2007, body JTHGL,46F675010214, to the Claimant.

11. I also order that the Defendant do pay to the Claimant a penalty in the sum of 240,945 Tenge, AIFC court fee in the sum of 32,500 Tenge, expenses in the sum of 350,000 Tenge and for translation services the sum of 55,00 Tenge. These sums shall be paid within 14 days of the Order reflecting my decision.

By the Court,

The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ibragimova Assiya, "VETO" Legal Center" LLP, Astana, Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 August 2024

CASE No: AIFC-C/CFI/2024/0013

ALAGUZOVA ASSEMGUL AMANGELDIYEVNA

Claimant

v

BAGAZAT AMANTAY

Defendant

JUDGMENT

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

ORDER

1. **The application for permission to appeal is granted.**

JUDGMENT

1. The Claimant has applied for permission to appeal against the judgment of Justice The Rt. Hon. Lord Banner on 15th February 2024 pursuant to Part 29 of the Rules of the AIFC Court.

2. He gave judgment for monies owing to the Claimant in relation to a car together with costs but refused an application for an Order requiring the Defendant to transfer the car back to the Claimant.

3. The Defendant has neither paid any of the sums owing to the Claimant in connection with the transfer of the car nor engaged with the court in relation to this litigation.

4. In my judgment an appeal has real prospects of success. The Defendant has acquired no rights in connection with the car and ought to return it to the Claimant.

5. I have read the application for permission to appeal and direct that there should be a short hearing (one hour allowed) on a day to be fixed as soon as is convenient to the Claimant and the Court. The hearing can be remote.

6. I further direct that the Claimant's lawyers should file for the hearing a draft order for the return of the car and any monies they say are owing.

7. The Defendant should be served with a notice of the hearing date.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Ibragimova Assiya, "VETO" Legal Center" LLP, Astana, Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

24 January 2024
CASE No: AIFC-C/CFI/2023/0024

MR. MORIEL CARMI

Claimant/Appellant

v

ASTANA FINANCIAL SERVICES AUTHORITY

Defendant/Respondent

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. Sir Jack Beatson FBA

JUDGMENT

A THE PARTIES AND THE DISPUTE

1. This is an appeal pursuant to section 11(1) of the AIFC Financial Services Framework Regulations No 18 of 2017 (the "FSFR"). The appellant, Mr Moriel Carmi, challenges the decision of the Astana Financial Services Authority ("the AFSA") dated 23 May 2023 to reject his application for a licence to operate a crypto currency trading and custody facility in the FinTech Lab in the Astana International Financial Centre ("AIFC"). The application, dated 1 December 2022, was made by him as the controller of Banxe Asia Ltd. a subsidiary of Banxe Ltd., a United Kingdom registered company of which he is the sole beneficial owner. Mr Carmi launched these proceedings in a claim/application form received by the AIFC Court on 14 July 2023 and registered by the Court on 21 July 2023.

2. Mr Carmi, now aged 62, was born in the USSR. I give further details about him later in this judgment. Here it suffices to state that he changed his name from Mark Weinstein or Vaynshtein at about the time he emigrated from Russia, that he is a citizen of Israel and has been since a date between 2008 and 2010 and is currently a resident of France with a long-term residence permit issued on 26 March 2019. He has worked in the financial sector since 1991, first in Russia and between 2019 and 2021 in Latvia. Since 2020 he has established several fintech firms in Europe and England, including Banxe Ltd. Mr Carmi filed this appeal on 14 July 2023 and it was registered by the Court on 21 July 2023. His grounds of appeal are summarised at [59] – [70] below.

3. AFSA is the legal entity "*responsible for the regulation of financial services and related activities in the AIFC*" with power "*to conduct the registration, recognition and licensing of AIFC Participants*": see Article 12(1) and (3) of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre ("the Constitutional Statute").

4. The AFSA's decision, in a FinTech Division Notice, dated 23 May 2023, stated that, having considered the criteria set out in the AIFC Acts and the information provided in the application, it was of the view that Mr. Carmi had not demonstrated to its satisfaction that he is a fit and proper person to be a Controller of an Authorised Firm. The notice informed him that he had a right of appeal to this Court. Its reasons for refusing his application were given in a FinTech Division Notice dated 12 June 2023 and are summarised at [51] – [58] below. Essentially, they are

that the AFSA considered that he had not given an accurate or complete account of the information relevant to his application either in the original application or in his responses to questions asked by the AFSA during its due diligence investigation. Those omissions and material about him identified by the AFSA when carrying out open-source research on him raised questions about his integrity, honesty, and reputation. This included information concerning JSCB Russobank (hereafter "Russobank") which Mr Carmi founded in 1993 with a shareholding of 40% and of which he was Chairman of its Supervisory Board in December 2018 when, following an investigation, the Central Bank of the Russian Federation (the "CBR") revoked the Bank's licences to carry out banking operations and professional activities in the securities market, and about Mr Carmi's change of name.

5. In section 7 of his Claim/Application form Mr Carmi stated that he is not legally represented. His case is contained in section 2 of that form and three other documents. Its essence is that he sold his shares in Russobank in 2010 and thereafter had no direct managerial powers in the bank because his only position in it, as Chairman of its Supervisory Board, was honorary, and he was therefore not required to disclose information about the revocation of the bank's licence in 2018. He submitted that the AFSA erred in its understanding of the position of being the Chair of the Supervisory Board under Russian law and the consequences of being on the Board of a Bank which has had its licences revoked under the Russian Federal Law No 395-1 of 1 December 1990 on Banks and Banking Activities (hereafter "the Law on Banks and Banking Activities"). He also submitted that he had disclosed all the requested personal information about himself with his application and in response to the AFSA's questions.

6. In relation to the position under Russian law, Mr Carmi offered to provide an opinion on the legal status of the chairman of the Board of Directors (Supervisory Board) of the Bank in general and himself in particular. He filed the opinion of Mr Valery Yakovlevich Zalmanov dated 13 November 2023. The AFSA filed the expert report of Mr Vyacheslav Frantsevich Khorovskiy dated 30 November 2023. The other documents relied on by Mr Carmi are his Response dated 5 October 2023 to the AFSA's Defence and his response and objections dated 12 December 2023 to the admission of Mr Khorovskiy's expert report. I consider the expert reports, Mr Carmi's objections to the admission of Mr Khorovskiy's report, and a second report by Mr Khorovskiy dated 8 January 2024 responding to those objections at [71] – [83] below.

7. The AFSA's case is contained in two undated documents signed by Mr Ben Jaffey KC, a Defence and a Response to Mr Carmi's Final Written Submissions, which are accompanied by statements of truth signed by Mr Isaq Burney, the AFSA's Chief Legal Officer, respectively dated 18 August and 20 October 2023. Mr Jaffey's written submissions are dated 1 December 2023 as is the AFSA's application to adduce Mr Khorovskiy's report which, on or about 5 December 2023, I granted. I also granted its application dated 10 January 2024 to adduce a report by Mr Khorovskiy dated 8 January 2024 responding to Mr Carmi's objections to his earlier report.

8. As to procedure, the Court issued directions on 20 October 2023 setting a timetable for the service of written submissions. In his claim form Mr Carmi requested that his appeal should be resolved on the papers. Mr Jaffey's written submissions state that the AFSA is content for the appeal to be determined. on the papers or at an oral hearing if that would be of assistance to the Court. I have concluded that, in the light of the nature of the dispute, the material before the court, and the parties' responses to inquiries I made on 6, 8, 17 and 19 December 2023, it is possible to determine the appeal on the papers. I, however, observe that the need for those inquiries has delayed the completion of this judgment. I here refer only to my inquiry about the text of the Russian Law on Banks and Banking Activities. The Russian and English texts filed by Mr Carmi reflected the text of that statute as of 2008 rather than the up-to-date text of the statute as amended. Although what the AFSA filed was up-to-date, it only filed part of Article 16, a key provision in the parties' cases, rather than the entirety of that provision. Both parties are to be criticised for what they furnished to the court.

9. Mr Carmi's explanation, given only in response to my inquiry, is that the 2008 versions were provided because that was "*the only found translation of the entire law officially translated into English*". That is unsatisfactory. There is no excuse for furnishing an out-of-date version of a statute on which a party intends to rely. It is the responsibility of the parties to proceedings in this Court under section 31 of the AIFC Court Regulations and §§2.2 -2.4 of the AIFC Court Rules 2018 to furnish the materials on which they rely in English, if necessary, by commissioning a translation of them.

10. The AFSA's provision of only part of Article 16 in what appears to be an informal translation meant that, until my request, there was no copy of the complete up-to-date version of that provision. Article 16 *inter alia* refers to the need for the Directors of a Bank to meet the requirements of business reputation in it and one of the issues in this case, is the consequence of not doing so

and the period of any disqualification. In its letter responding to my inquiries, the AFSA states that what it provided highlighted the main criteria for business reputation relevant to these proceedings. Although other parts of Article 16 may note be directly relevant to the issues in this case, they may provide contextual assistance to the interpretation of the parts of it which are relevant to those issues.

B THE STRUCTURE OF THIS JUDGMENT

11. Sections C – E of this judgment deal with the jurisdiction of this court, the right of appeal against decisions of the AFSA and the grounds upon which its decisions may be appealed, and AFSA's regulatory framework, functions, and powers. Sections F, G, and H summarise Mr Carmi's application, the AFSA's review of it, and the Report to and the decision of the Committee on Authorisation of FinTech Lab Applications. Sections I, J and K summarise the AFSA's reasons for its decision, Mr Carmi's grounds of appeal, and Messrs Zalmanov and Khorovskiy's expert reports on the legal status of the chairman of the Board of Directors (Supervisory Board) of a Bank in the Russian Federation. Section L contains my discussion of, and conclusions on, the questions before this court, and Section M, my order. For the reasons given at [84] – [103] below, I have concluded that the AFSA did not make an error of law or other recognisable public law wrong when making the decision and that the appeal should be dismissed.

C THE JURISDICTION OF THE AIFC COURT

12. Article 26(5) of the AIFC Court Regulations gives this court jurisdiction to hear and determine appeals from decisions of AIFC bodies where the appeal relates to a question of law, an allegation of miscarriage of justice, an issue of procedural fairness, or a matter provided for under AIFC law. By Article 4(1) of the Constitutional Statute, AIFC law consists *inter alia* of AIFC Acts which are not inconsistent with the Constitutional Statute. Article 4(1-2) of the Constitutional Statute provides that those Acts may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by the Constitutional Statute.

D RIGHT OF APPEAL & GROUNDS UPON WHICH DECISIONS MAY BE APPEALED

13. Articles 11(1) and (2) of the FSFR makes provision for appeals against the decisions of the AFSA and set out the grounds upon which such decisions may be appealed. They provide:

> *"(1) A person aggrieved by a decision of the AFSA may appeal to the AIFC Court against the decision.*
>
> *(2) The grounds of an appeal under this section are that:*
>
> *(a) the decision was ultra vires or there was some other error of law;*
>
> *(b) the decision was unreasonable;*
>
> *(c) the decision was made in bad faith;*
>
> *(d) there was a lack of proportionality; or*
>
> *(e) there was a material error as to the procedure*."

14. I note that the grounds enacted in Article 11(2) are those available in a common law application for judicial review which are used to supervise governmental and regulatory bodies and the legality and procedural fairness of their decisions. The supervisory jurisdiction is the means by which the exercise of power by a public authority is "*strictly limited to the scope and purposes of the [legislation granting it authority] and to the common law's insistence on rationality and fairness*": see e.g. *Sheffield City Council v Smart* [2002] EWCA Civ. 4, at [20] *per* Laws LJ. Article 11(2) does not provide for an appeal on the substantive merits of a decision but on whether the decision-maker has made a recognisable public law wrong.

E AFSA's REGULATORY FRAMEWORK, FUNCTIONS AND POWERS

15. I have referred to the AFSA's power under Article 12(3) of the Constitutional Statute of the Republic of Kazakhstan on the AIFC "*to conduct the registration, recognition and licensing of AIFC Participants".*

16. The AFSA's main functions and powers are set out in FSFR, Article 7. That provides that in performing its functions and exercising its powers, it will pursue the objectives listed in Article 7(3). Those objectives include:

> "*(b) ensuring that financial markets in the AIFC are fair, efficient and orderly*",
>
> …

(d) fostering and maintaining confidence in the AIFC's financial system and regulatory regime",

…

(f) preventing, detecting and restraining activities that may cause damage to the reputation of the AIFC or to the financial activities carried out in the AIFC by taking appropriate measures, including by imposing sanctions,

(g) protecting the interests of investors and users of financial services", and

(h) implementing in the AIFC a regulatory regime that complies with international standards in the sphere of regulation of financial services".

17. Part 3 of the FSFR deals with the licensing of AIFC participants. Chapter 1 provides for the licensing of Authorised Firms to carry on Regulated Activities. Articles 31, 34 and 35 respectively provide for the form and content of applications, the criteria for the grant of a licence, which include whether the AFSA is satisfied that the applicant is "*fit and proper*", and what is required when the AFSA grants or rejects an application. In particular, where it rejects an application, it must inform the applicant in writing of the refusal and, where requested by the applicant, the reasons for such refusal, and of the applicant's right to appeal the decision to this Court: Article 35(3).

18. Since Mr Carmi's application was to operate in the FinTech Lab, the AIFC Financial Technology Rules (the "Fintech Rules") also applied to it. Section 2.4 of those Rules provides for the application process. Section 2.4.2 requires a pre-application form to verify the eligibility of a person to test and/or develop FinTech activities within the lab as well as an application. The eligibility criteria are set out in sections 2.2.1 and 2.3.1. The matters to be considered in assessing the application in section 2.4.3(b) include whether the applicant is "*fit and proper*". AFSA has also issued Fintech Lab Authorisation Procedures to describe its approach to the assessment and authorisation of firms. Section 3 of those states that the authorisation process consists of three main sequential phases; pre-application review and eligibility assessment; application review and risk assessment; and the licensing process.

19. Article 119 of the FSFR provides that a person commits a contravention if he *(a) fails to comply with any prohibition or requirement imposed on him by the AFSA; … (c)* "*does not do something that the Person is required to do under any legislation administered by the AFSA; … (e) acts in a deceptive, misleading or dishonest manner in any context, or (f) otherwise commits any contravention described as such in these Regulations or Rules made by the AFSA*".

20. The regulatory framework in the FSFR operates together with the AIFC General Rules. Rule 1 of those Rules deals with licensing of AIFC participants, and *inter alia* in Rule 1.1.2, the form and content of applications for a licence, and in Rule 1.1.5, the considerations AFSA "*will consider*" in assessing whether an applicant is fit and proper for the purposes of Article 34(1)(b) of the FSFR. Those considerations include: "*(a) the fitness and propriety of the members of its governing body; (b) the applicant's connection with any person or membership of any group; (c) the fitness and propriety of the applicant's Controllers or any other person associated with the applicant; (d) the impact a Controller may have on the applicant's ability to comply with the applicable requirements; (i) any matter which may harm or may have harmed the integrity or the reputation of the AFSA or AIFC …".*

21. Rule 4 of the AIFC General Rules sets out 13 Core Principles for Authorised persons. In the context of this case the relevant principles are Principle 1, integrity, Principle 2, due skill, care and diligence, and Principle 11, relations with the AFSA. Rule 4.2.1 provides that "*an Authorised Person must observe high standards of integrity and fair dealing".* Rule 4.2.2 provides that "i*n conducting its business activities, an authorised person must act with due skill, care and diligence".* Rule 4.2.11 provides that "*an Authorised Person must deal with the AFSA in an open and cooperative manner and keep the AFSA promptly informed of recent events or anything else relating to the Authorised Person of which the AFSA would reasonably expect to be notified*".

22. The final relevant component of AFSA's regulatory system is the AIFC's Regulatory Guidance on Fitness and Propriety ("the Regulatory Guidance"). Introduced in June 2022, it is, see §1.2, to be read in conjunction with other relevant rules, in the present context, the FSFR and the AIFC General Rules. By §1.3 of the Regulatory Guidance, where the Authorised Person is a legal person, "*the fit and proper assessment will be conducted on the legal person, natural persons who are the beneficial owners, controllers and persons in Controlled Functions".* Section 5 provides guidance on the assessment of the fitness and propriety of individuals. §5.9 provides that when making the assessment "*the burden is on the authorised person, ASP or applicant sponsoring the application to satisfy the AFSA that the person is fit and proper to perform the function for which the person is proposed to be engaged".* §5.10 states that *"Applicants and persons are expected to provide complete and truthful information" (*emphasis to both paragraphs added).

23. In relation to integrity, honesty and reputation, §5.16 of the Regulatory Guidance provides that AFSA will consider matters including but not limited to the 13 items listed at §5.16(a) – (m) "*which*

may have arisen in the Republic of Kazakhstan or elsewhere". Three of these items are of particular relevance to this case. The matter identified by §5.16(g) is whether the person has been involved with an organisation *"which has been refused registration, authorisation, membership or a licence to carry out a trade, business or profession or has had such registration authorisation membership or licence revoked, withdrawn or terminated"* by a governmental or regulatory body. That identified in §5.16(h) is whether because of the removal of the licence, registration or other authority, the person has been refused the right to carry on a trade, business or profession, and that identified in §5.16(j) is whether the person *"has been investigated, disciplined, censured, or suspended by a regulatory or professional body, a court or tribunal, whether publicly or privately".*

24. As Mr Jaffey observed at §§16-17 of his written submissions, these regulations substantially mirror the financial services regime in the United Kingdom on which the AIFC regime was based. Both deploy the concepts of fitness, propriety, and integrity. Both require candid and truthful dealings with regulatory bodies, and both provide that one of the factors to which a regulator should have regard is whether the applicant has been involved with a company which has had its authorisation revoked or investigated by a regulatory or government body. Accordingly, useful guidance can be obtained from decisions of courts and tribunals in the UK such as that of the Tax and Chancery Chamber of the Upper Tribunal in *Page v Financial Conduct Authority* [2022] UKUT 124 at [55] – [59], which concerned the conduct of the chief executive of a regulated insurance firm. It was there stated that "*what constitutes acting with integrity … is a fact specific exercise*", and that the concept "*is wider than the concept of dishonesty and does not necessarily involve deliberate behaviour*". It was also stated that a failure to disclose "*appropriately any information of which [a regulatory authority] would reasonably expect notice"*, may, "*depending on the circumstances … amount to acting without integrity"* in breach of the FCA's Principle 1.

25. After considering the tribunal's decision in *Forsyth v FCA and PRA* [2021] UKUT 0162 (TCC) in which the earlier authorities on regulated businesses and professions were reviewed, the conclusion in *Page's* case was that essentially, as Rupert Jackson LJ had stated in relation to the conduct of solicitors in *Wingate v Solicitors Regulation Authority* [2018] 1 WLR 3696 at [95], [97] and [100], "*in professional codes of conduct, the term 'integrity' is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members*". They are expected to be more scrupulous about accuracy than members of the general public in daily discourse and to take particular care not to mislead

because (see *Page's* case at [59]) of "*the trust that the public rightly put in those who lead regulated financial services firms*".

F MR CARMI's APPLICATION

26. Mr Carmi's Pre-Application form to operate in the FinTech Lab is dated 1 September 2022. In its pre-Application eligibility report dated 27 September 2022 the AFSA recommended granting him a Participant Certificate, and, on 30 September 2022 it invited him to complete the full application form for the Fin-Tech Lab online. His full application was submitted on 1 December 2022. In both forms Mr Carmi is named as the person lodging the application and his position is stated to be "law[y]er". Mr Vadim Chshukin (or Schukin) is named as the person for the AFSA to contact. Mr Schukin was the person who communicated on Mr Carmi's behalf with the AFSA, on a number of occasions attaching documents responding to the AFSA's requests which are signed by Mr Carmi.

27. The first page of the FinTech Lab Pre-Application form contains an initial note. This *inter alia* states: "*You must answer every question in this Pre-application and attach [the documents that may be relevant to support your answer".* It also states: *"Is important that you provide accurate and complete information and disclose all relevant information. If you do not, it will call into question the applicant firm's suitability to be authorised, and you may be breaching article 119 (e) of the AIFC Framework Regulations".* The first page of the full Application form reiterated what had been stated in the initial note in the Pre-Application form, including the two statements set out above.

28. In the Pre-Application form, Mr Carmi's "country of origin" is stated to be Israel. On page 1 of his full application his country of origin is stated as "IL"; that is Israel, and in the "*Controllers"* section on page 3 his nationality is given as "*Israel*", and his country of residence is stated to be "*France".* The answer given to the question in section 2.1 of the "*Compliance"* section: "*Have you performed a rigorous due diligence on the legal and regulatory requirements of AIFC for deploying the proposed Fintech activities and understood them?",* was "yes".

29. The Application form contained a "*Fit and Proper Questionnaire*". The answer to the question "*Has the applicant or any member of your Group been made aware, whether formally or informally, that it is the subject of a current or pending investigation, review or disciplinary procedure by any regulatory authority, professional body, Financial Regulator, self-regulatory*

organisation, regulatory exchange, clearing house, government body, agency, or any other officially appointed inquiry was "No". The same answer was also given to questions asking whether Mr Carmi or any member of his Group had at any time been (i) the subject of disciplinary procedures by a government body or agency or any financial services regulator, self-regulatory organisation, or other professional body, (ii) refused or had a restriction placed on the right to carry out a trade, business or profession requiring a licence, registration or other permission, and (iii) censured disciplined, publicly criticised or the subject of any investigation or inquiry by any regulatory authority.

30. The last section of the form, which, as noted above is stated to be lodged by Mr Carmi, contains a "Declaration by Applicant" stating *inter alia* that "*by submitting this application*" the applicant declares that the information in it "*is true and correct to the best of my knowledge and belief*" and that he "*has taken all reasonable steps to ensure that the attached documents to Application (sic) are accurate and complete".* The declaration also states: "*the Applicant understands that AFSA is entitled to such enquiries (sic) and can seek such further information as they think appropriate at any time before or after the applicant has been authorised to verify the information given on this Application or in the provided documents …"* and "*If at any time after making this declaration , applicant becomes aware of a material change in any information in this application (including any attachment thereto) that is reasonably likely to be relevant to the AFSA consideration of this Application, applicant will inform the AFSA in writing about that change without delay"*.

31. Mr Carmi's *curriculum vitae* was attached to the application. This states that his citizenship is "The State of Israel" and that he is a resident of France. It gives his educational background at Institutions in what is now the Russian Federation and his work experience between 1983 and August 2019 as in the USSR and then the Russian Federation. Of central importance to these proceedings are the entries about the Russian Coal and Raw Materials Bank which he founded in 1993. The *curriculum vitae* states:

"*1993*	*The Founder of the Russian Coal and Raw Materials Bank ("JSCB Russobank"), Moscow, shareholder (ownership interest 40%) renamed Russobank (1999) and transformed into a stock company.*
1993-2010	*Chairman of the Board of Directors of the Bank 'Russobank"*
2010-2019	*Chairman of the Supervisory Board of the Bank 'Russobank'"*

32. The *curriculum vitae* has entries stating that between August 2019 and April 2021 he was the Commercial Director of SIA New Solution, a company incorporated in Latvia, now owns a small cosmetic company "*Philosophy of Aesthetics +*" with his wife, and that since 2020 he has "*established several fin-tech firms in Europe and England to commence activities in the field of finance around the world".* He stated that he was the sole beneficial owner of two United Kingdom registered companies, Bankxe Ltd, and Tompay Ltd., respectively incorporated in January 2019 and February 2020, and one Estonian company, OÜ NeuroNext Platform, incorporated in February 2020.

G THE AFSA's REVIEW OF MR CARMI'S APPLICATION

33. The AFSA's review of Mr Carmi's 1 December 2022 application and its due diligence exercise took until 18 May 2023. It first conducted what is described as a brief risk analysis. A document dated 27 December 2022 refers *inter alia* to public information that Mr Carmi is one of the controlling individuals of SMT Holding OÜ, which operates several regulated that unregulated payment processors for high-risk industries and merchants including Banxe Ltd and NeuroNext OÜ. It also refers to the positions Mr Carmi held in Russobank until 2019 and states that on 21 December 2018 the CBR revoked Russobank's licences to operate as a bank and in the securities market. The reasons the CBR gave for doing so were the repeated violation of local Anti-Money Laundering legislation and involvement in dubious transit operations. A copy of the CBR's Order and links to its press release and media reports were attached to the AFSA's document. The CBR's press release stated that *"it should be noted that a significant part of these transactions was related to the shadow sale of cash proceeds by retail trade entities to third parties and the withdrawal of funds abroad"* and that a temporary administration was appointed for Russobank until the appointment of a bankruptcy manager or liquidator.

34. On 24 February 2023, as part of the AFSA's assessment of Banxe Asia's financial soundness, Aibek Mukhambekov, an Associate at its Authorisation Division, wrote to Mr Schukin asking for the origin of US$ 2,000,000 which Bank Zenith PJSC, on Mr Carmi's instructions, had informed the AFSA he had on deposit. The email also asked for supporting documents and disclosure of the activities involved in obtaining the funds. At some stage, the AFSA wrote to the CBR asking it to confirm the revocation of Russobank's licence and to provide information about Mr Carmi's role within the Bank's management structure. It appears from page 2 of the report on the application

to the FinTech Lab committee assessing Mr Carmi's application (see [44] below) that in a letter dated 6 March 2023, the CBR confirmed the revocation of the banking licence but was unable to identify Mr Carmi's position in the Bank without the necessary identification documents and a certificate of name change.[1] On 9 March 2023, Mr Mukhambekov wrote asking whether Mr Carmi was still a shareholder in Russobank and, if he was not, to whom his shares were sold, what influence he has had in its management and decision-making since its inception, and "*in connection with what did Mr Carmi leave the bank in 2019"*. The email also asked about Mr Carmi's position and duties at SIA New Solution, the Latvian company named in his *curriculum vitae,* and the reason he left that company.

35. Mr Schukin forwarded Mr Carmi's replies to these requests on 15 and 18 March 2023.[2] In the letter attached to the email dated 15 March, Mr Carmi stated that he sold his 40% shareholding in Russobank in 2010 to three identified individuals and has not been a shareholder since. He also stated that he resigned as chairman of the Bank's Management Board in 2010 due to immigration to Israel and later to Europe and took "*the honorary position of Chairman of the Bank's Supervisory Board*". He stated that his competence as Chairman of the Supervisory Board was limited to the coordination of the strategic planning of the bank's activities and that operational management and audit control were not within it. He stated that he:

> *"… actually, left the bank in 2010 due to migration to Israel (and later to Europe). The honorary position of the Chairman of the Supervisory Board had no impact on the actual management of the bank. Thus, since 2010, Mr Carmi had no influence on the management of the bank and its activities, either as a shareholder or as a top manager*".

36. In that letter Mr Carmi also stated that he was additionally providing the AFSA with information about his change of name in 2008. His letter states that this was for religious reasons in connection with immigration (repatriation) to Israel. He stated that his previous name was Mark Mikhailovich Weinstein and that "*Israeli law requires both names (current and previous) to be published in an Israeli passport within the first 7 years after a name change"* but that after 7 years "*only the changed (so-called new) name is published in the passport".* He attached a copy of the

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1 The CBR's letter is not before the court but a later letter dated 4 May 2023 responding to a request by the AFSA dated 7 April 2023 which provided the documents requested is: see [41] below.

2 A number of quotations from Mr Carmi's responses summarised in this and the next 5 paragraphs are set out at [45] – [47] below.

Change of Name certificate issued by Israel's Ministry of Internal Affairs which stated that the change of name was effective as of 16 June 2010, and an extract from the Population Register dated 20 February 2020 stating that on 19 November 2008 he was registered at an apartment in Holon.

37. In the letter attached to the email dated 18 March, Mr Carmi stated that the origin of the funds in his account at Bank Zenith PJSC were the sale of a house in Jurmala, Latvia but that since sanctions had been applied to that bank, funds with it could no longer be offered as proof of Banxe Asia's financial soundness. To do this, he provided evidence of a deposit of €1.394 million in his account with TomPay Ltd., and stated that the source of the deposit was the sale of a yacht on 17 March 2023. He provided the sale agreement which identified him as "*Mr Carmi Moriel AKA Mark Vaynshtein*".

38. On 27 March 2023, Mr Mukhambekov wrote to Vadim Schukin asking for further information within 15 working days. There were three questions about Russobank. The first was who owned the remaining 60% of its shares. The second was for Mr Carmi to provide documents such as the Articles of Association or another corporate document which confirmed what he had stated about the limitations of his competence as Chairman of the Supervisory Board of Russobank. The third was for further information about the three persons to whom he sold his 40% stake in the bank, including transaction details. A fourth question asked Mr Carmi to explain whether information in an article in the newspaper Kommersant was accurate. Kommersant stated that after Russobank received notice in June 2018 from the Central Bank of Russia about violations by it, Mr Carmi sought the help of people, including Colonel Kiril Cherkalin of the FSB, who could help. It also stated that after Russobank received a second notice in the autumn of 2018 Colonel Cherkalin offered to resolve the issue "*but not for free of charge*". Two other questions asked whether Mr Carmi had affiliations with two particular companies and, if so, for further information about them.

39. Mr Schukin attached Mr Carmi's responses to these requests with supporting documentation to an email to the AFSA dated 2 May 2023. Mr Carmi's letter gave information about the details of the sale of his shares in Russobank including the dates of the sales, the price (their par value), and the dates of payment. Copies of the sale and purchase agreements, the list of the registered persons in the security holders' register as of 22 January 2019, and of Russobank's Regulations on the Board of Directors approved on 2 October 2017 were attached to Mr Schukin's email. On

3 May 2023, Mr Mukhambekov wrote to Mr Schukin saying that the AFSA had requested Russobank's Regulation on the Competence of the Supervisory Board of Directors but had been provided with the Regulation on the Board of Directors and asked for the correct document and the relevant corporate resolution adopting it. Mr Schukin replied on 5 May stating that "*The Board of Directors and the Supervisory Board are one and the same body of the bank, there is no difference in competence. Regulations on the Board of Directors were approved by the general meeting of shareholders".*

40. Mr Carmi's letter attached to Mr Schukin's email dated 2 May 2023 also contained his responses to the AFSA's request for explanations about the information in the article in Kommersant. His letter stated that the article in Kommersant "*largely coincided with the truth*" but "*differed significantly in the statement about [a bribe of € 500,000 allegedly] offered by [him]".* That, he said was a lie and not substantiated by further interviews or other sources, but nevertheless was echoed by other Russian news channels, seemingly without further fact checks. He also referred to media reports that Colonel Kirill Cherkalin of the FSB was involved in a large-scale corruption scheme including extortion and forced liquidations of small Russian banks and to media reports of a case in the Moscow District Military Court against Colonel Cherkalin who was accused of organised crime and taking bribes. Under the heading "additional comments", the letter referred to Mr Carmi's attempts to contact Mr Yuri Polupanov at the CBR and his meetings with Colonel Cherkalin which he stated were evidenced by correspondence "*which was presented during an interrogation at the Investigative Committee of the Russian Federation where [he] demanded a criminal case against Cherkalin*".

41. The CBR's reply to the AFSA's request for information about Mr Carmi's role in Russobank's management structure is in a letter from VV Chistyukhin, First Deputy Governor of the CBR dated 4 May 2023. The letter stated that according to the information available to it a person with a similar name, surname and date of birth had been chairman of the board of directors from 1 February 2012 to 23 December 2020. The letter also stated:

> "*in connection with the exercise by the indicated person of the functions of the Chairman of the Board of Directors of JSCB RUSSOBANK During the 12 months preceding the day of revocation of the licence to carry out banking operations and the appointment of a temporary administration to manage the designated credit institution, Marc Weinstein has no right to hold positions/ perform the functions of a member of the board of directors, who*

are subject to business reputation requirements established by relevant legislation, as well as be the owner of more than 10% of shares (rights of participation) of financial organisations, the controller of such owners and their sole executive body:

in the period from 21 December 2018 to 21 December 2028 in Russian credit institutions;

in the period from 21 December 2018 to 21 December 2023 in Russian non-credit financial institutions".

H THE REPORT TO THE COMMITTEE ON AUTHORISATION OF FINTECH LAB APPLICATIONS AND THE COMMITTEE'S DECISION

42. The final stage of the process was the preparation of a report to the AFSA FinTech Lab Committee assessing Mr Carmi's application in the light of the information he disclosed in his application, the information he gave in response to the further questions the AFSA had asked as part of its process of due diligence, including matters identified in its research into open-source material. That report, dated 10 May 2023, was prepared by Mr Mukhambekov and reviewed by Mr Yagub Zamanov, a Director at the AFSA's FinTech Division. It first summarised Mr Carmi's background, history and principal activities, including his role at Russobank. Their assessment is under a general heading of "*Integrity*" which has five sections which I now summarise.

43. The first section is "*Name and Surname Change*". It records that the assessors identified that Mr Carmi changed his name and surname and what information about this Mr Carmi then gave in response to their inquiry. It states:

"*However, we have reason to believe that Mr Carmi possesses two passports: one issued by the Israeli state authority to Moriel Carmi and the other issued by the Russian Federation to Mark Weinshtein. This information was discovered in the Purchase Contract of Immovable Property No. Z2, dated 29 September 2020, between Mr Carmi and Marina Gulaeva. In the contract Mr Carmi provided his passport details issued on 25 September 2017 in Moscow. It is worth noting that Mr Carmi has submitted his Israeli passport, which bears a new name and surname along with his application.*"

44. The second section is "*Banking Licence Revocation*". It states:

> "*As we mentioned earlier, the CBR has revoked the banking licence of [Russobank], and as a result, the bank was liquidated in 2020. In order to conduct due diligence on the Bank, we requested the CBR as the home regulator of the bank to confirm the revocation of the banking licence and to provide information about Mr Carmi's role within the Bank's management structure. In response to our request, the CBR issued a letter … dated 6 March 2023 confirming the revocation of the banking licence but was unable to identify Mr Carmi's position within the Bank without the necessary identification documents and a certificate of name change. We have since obtained these documents and submitted a new request to the CBR, and we are still waiting for a response. It should be noted that Mr Carmi failed to disclose the aforementioned information in his Application, despite being required to do so.*"

The reply is given in the letter dated 4 May 2023 from the First Deputy Governor of the CBR Referred to at [41] above. It is not clear whether it had not reached the AFSA by 10 May 2023, the date of this Report, or whether the writers of the Report omitted to update this paragraph or did so orally at the Committee meeting on 23 May 2023.

45. The third section is "*Management Influence in the Bank*". It *inter alia* states:

> *"… In order to gain clarity on Mr Carmi's management influence over the bank, we have requested: (i) an official document certifying the ownership rights of the Bank's shareholders, and (ii) information regarding Mr Carmi's involvement in the management of the Bank. Mr Carmi provided a written explanation indicating that he withdrew from the composition of the Bank's shareholders in 2010 and has not been involved in any operational activities since then. Additionally, he stated*

that he did not possess any decision-making powers in the bank. For reference, please see the citations below:[3]

> *"Mr. Carmi withdrew from the shareholders of JSCB RSUUOBANK in 2010, having sold the entire block of his shares to three persons: Ivanova L.V., Shved S.I. and Andrusev A.M. Thus, from 2010 to the present, Mr. Carmi has not been a shareholder of JSCB RUSSOBANK."*

> *"In 2010, Mr. Carmi resigned as Chairman of the Management Board of JSCB RUSSOBANK due to emigration to Israel (and later to Europe), taking the honorary position of Chairman of the Bank's Supervisory Board.* ***Competence of the Chairman of the Supervisory Board was limited only to the coordination of the strategic planning of the bank's activities****. Operational management, audit, control over the activities of JSCB RUSSOBANK and making other decisions were not within the competence of Mr. Carmi as Chairman of the Supervisory Board."*

*As part of this pursuit, Mr Carmi provided a list of the Bank's shareholders as of 22 January 2019 (hereinafter referred to as the "**List**") which revealed that Ms Liubov Ivanova, Mr Stanislav Shved, and Mr Alexey Andrusev (these individuals were previously mentioned in the first citation) collectively own approximately 40% (21,020 shares) of the Bank's total issued shares of 52,128. However, we have been unable to verify through the transaction records whether Mr Carmi had fully divested his shareholding while the Bank was undergoing under the administrative processing by the CBR. This uncertainty arose from the Share Sale and Purchase Agreement dated 2*

[3] The underlined passages in this and [46] and [47] below are quotations from Mr Carmi's responses to AFSA's requests dated 24 February and 27 March 2023.

December 2011 between Mr Carmi and Mr Igor Shved6, which indicated that Mr Carmi only transferred 7,985 shares, whereas the List shows that Mr Stanislav Shved owned 10,418 shares. Therefore, it is conceivable that Mr Carmi may have retained a measure of control over the Bank and may have exerted his shareholder rights when the CBR revoked the banking license.

In addition, we have identified that the Board of Directors and the Supervisory Board of the Bank are the same body according to Russian Federation law. We have also received an email confirmation from the applicant's contact person that these bodies are the same. This means that Mr Carmi continued to hold his position on the Board of Directors, despite claiming to have resigned from it. The law stipulates that the Board of Directors has a range of competencies, including but not limited to:

- *Determining the priority areas of the company's activities;*
- *Convening annual and extraordinary General Meeting of shareholders;*
- *Approving of an agenda of the General Meeting of shareholders;*
- *Appointing and dismissing the executive body of the Bank if authorized by the company's charter;*
- *Defining principles and approaches for organizing risk management, internal control, and internal auditing in the company.*

Moreover, as per the Ruling of the Supreme Court of the Russian Federation No. 305-ЭС21-16982 dated 23 September 2021, the Court determined that Mr Carmi was serving as the Chairman of the Board of Directors of the Bank, which made him the Head of the executive body of the Bank, when the CBR revoked the banking license.
Given the above, we believe that Mr Carmi has not presented with sufficient evidence to support the claim that his powers were limited during his tenure as Chairman of the Bank's Supervisory Board."

46. The fourth section is "*Misconduct*". It *inter alia* states that during due diligence via various open sources the reviewers observed plenty of adverse reviews about Mr Carmi, including the

allegations about his attempts to enlist the help of people including Colonel Cherkalin who could influence the outcome of the CBR's investigation of Russobank referred to at [38] – [40] above. The explanation Mr Carmi gave is set out in the report:

> "'***I, M. Carmi in Nov. 2018 he tried to contact Mr. Yuri Polupanov at the Central Bank of Russia (CBR) to discuss potential issues****. This happened after Konstantin Krupsky, Managing Director of Russobank, showed an unofficial document form the Internet which showed a list of ca. 10 - 15 Russian banks challenged by CBR, which included Russobank.* ***I met Colonel Cherkalin several times.*** *In the second meeting with Mr. Cherkalin, the latter told that Russobank will face a process unless if I did not pay an amount of EUR 500'000. Cherkalin reportedly said that Russobank's shareholders had the money referring to a 1 million rubles allegedly spent for a wedding cake for Mark11 and Ekaterina12 Tipikin in 2017. Mr. Cherkalin remained without an answer. In a subsequent meeting of the shareholders of Russobank the situation was discussed with the decision that the shareholders did not want to pay the bribe. I, M. Carmi, stressed that some media wrote about me and that I allegedly was ready to pay a "smaller bribe" to Mr. Cherkalin, but this was not true.'*
>
> '*The evidence of meetings with Mr. Cherkalin is my correspondence with Cherkalin in the messenger Threema, which was presented during an interrogation at the Investigative Committee of the Russian Federation, where I demanded a criminal case against Cherkalin.'*
>
> *Based on the information above, we believe that Mr Carmi's handling of regulatory issues with state authority officers raises questions about his integrity, honesty, and reputation before the AFSA.*"

47. The fifth section of the Report is "*Fintech companies in other jurisdictions*". It *inter alia* states that during its due diligence on NeuroNext OÜ, an Estonian fintech company providing virtual currency services, it discovered that NeuroNext OÜ may have an affiliation with SMTP Holding OÜ, on which see [33] above. The report refers to inquiries the AFSA has made to the Estonian Financial Intelligence Unit ("FIU") through the Kazakh FIU about whether NeuroNext OÜ is subject to any

unresolved complaint, regulatory or criminal action or sanction, and whether it has an affiliation with SMTP Holding OÜ or ExFrame OÜ. It states that it has not yet had a response but observes that in his written clarification in response to the AFSA, Mr Carmi stated:

> "*We hereby inform you that SMTM Holding OU is not affiliated with Banxe LTD, Neuronext OU and Tompay LTD, does not have the same members of the company, directors, and other staff members. Moreover, Dmitry Orlov, who is a member of the board of SMTM holding OU, has not held the position of director of Neuronext OU since December 19, 2022, which is confirmed by the attached extract from the register.* ***Dmitry Orlov indeed simultaneously held the position of director at Neuronext OU and was a member of the board of SMTM holding OU at the same time, but during combining these positions, the companies themselves were not affiliated, only Dmitry Orlov himself was associated with both companies.***"

48. The Report concluded that:

> *"Having regard [to] the above facts as well as pursuant to section 5.16 of the Regulatory Guidance On Fitness and Propriety, and most importantly the risk of undermining the AFSA Regulatory Objectives by damaging the reputation of the AIFC, including reducing the level of confidence in both the financial system and the regulatory regime, we assume that Mr Carmi is not fit and proper to be authorised [to] carry on the Regulated and Market Activities in the AIFC."*

49. In the section of the Report containing their recommendations, Mr Mukhambekov and Mr Zamanov stated that, after reviewing the relevant criteria and the Application, considered that the application did not comply with principles 1, 2, and 11 in the AIFC General Rules (set out at [21] above) and that they were of the view that Mr Carmi is not *"fit and proper".* They stated that "w*e therefore recommend the AFSA FinTech Lab Committee to reject the Application*".

50. Mr Carmi's application and Mr Mukhambekov and Mr Zamanov's assessment of it came before the AFSA Committee on Authorisation of FinTech Lab applications on 18 May 2023. The brief minutes state that Mr Mukhambekov presented the assessment and answered questions by the Committee. Asked how long it had taken him, he said that it had taken approximately six months to complete the report. The minutes also record him stating:

> "*They had also received a message from the contact person that* Morial *Karmi denied the fact of being accused of state government and the actions were not legal. He also added that CBR has revoked the banking licence of the bank for repeated violations of the AML/CFT legislation taken by the Bank. Also Morial Karmi changed his name and did not inform AFSA".*

When there were no further questions a vote was taken, and the Committee unanimously voted to reject the application. The minutes state:

> "*Having reviewed the provided documents … the members of the Committee recommended to reject the in-principle approval of Banxe Asia Ltd.*".

I THE REASONS FOR THE AFSA'S DECISION

51. As stated in [4] of this judgment, the AFSA's reasons for its decision dated 23 May 2023 refusing Mr Carmi's application were given in a FinTech Division Notice dated 12 June 2023. After a summary of the application and of the decision notice dated 23 May 2023, Page 1 of the Notice stated that section 2.4.3(b)(iii) of the Fintech Rules (set out at [18] above) and §1.3 of the Regulatory Guidance (set out at [19] above) were the relevant statutory provisions and guidance. Page 2 set out the facts and matters the AFSA relied on and its Reasons in more detail under two headings; "*failure to demonstrate integrity*" and "*misconduct*".

52. ***(1) Failure to demonstrate integrity*:** Page 2 of the Notice stated that when assessing a person's integrity, honesty and reputation the AFSA acted in accordance with §§5.16(g)(h) and (j) of the Regulatory Guidance (these are set out at [23] above). The matters to be considered whether they occurred in the Republic of Kazakhstan or elsewhere included whether:

- "the applicant "*has been involved with a company … that has … had its authorisation, membership or licence revoked, withdrawn or terminated*".
- "*because of the removal of the relevant licence … or other authority, the person has been refused the right to carry on a trade, business or profession requiring a licence*". It is stated that the AFSA should be informed about all such occurrences but would consider the circumstances only where relevant to the regulatory requirements.
- "*the applicant or any business with which the person has been involved, has been investigated, disciplined, censured or suspended by a regulatory or professional body, a court or tribunal, whether publicly or privately*".

53. Essentially, AFSA's reasons in the Notice were that Mr Carmi had not given an accurate or complete account of the information relevant to his application, in particular in relation to Russobank. The Notice acknowledged that his application stated that he was Chairman of Russobank's Board of Directors until 2010 and between 2010 and 2019 was Chairman of its Supervisory Board. But page 2 of the Notice states that the AFSA observed during its due diligence that the CBR revoked Russobank's banking licence in December 2018. It also refers to the CBR's official statement (the CBR's Press Release summarised at [33] above) that Russobank repeatedly violated "*the AML/CFT legislation of the Russian Federation by failing to properly identify and report information on transactions subject to mandatory control*". The Notice also states that "*several factors indicated that the Bank purposefully engaged in suspicious transactions, and its management showed no intention of taking effective measures to halt such activities*". It concluded that "*it should be noted that the aforesaid information has not been disclosed in the Application to the AFSA FinTech Lab".*

54. Page 3 of the Notice sets out or summarises Mr Carmi's responses (summarised at [39] above) to the AFSA's requests for an official document certifying the ownership rights of the bank's shareholders and information regarding his involvement in the management of the bank. It records that Mr Carmi stated that in 2010 he resigned as Chairman of the Board due to emigration to Israel and then to Europe, took the honorary position of Chairman of the Bank's Supervisory Board, and sold his shares. He also stated that, since then he has not been involved in any operational activities and did not have any decision-making powers in the bank. He also provided a list of the Bank's shareholders as of 22 January 2019 identifying the three individuals to whom he had sold his approximately 40% holding. The Notice states that the AFSA was "*unable to verify*

through the transaction records whether Mr Carmi had fully divested his shareholding while the bank was undergoing... the administrative processing by the CBR" because "*the Share [SPA] dated 2 December 2011 between Mr Carmi and Mr Igor Shved … indicated that Mr Carmi only transferred 7,985 shares, whereas the list [of shareholders] shows that Mr Stanislav Shved owned 10,418 shares. Therefore, it is conceivable that Mr Carmi may have retained a measure of control over the bank and may have exerted his shareholder rights when the CBR revoked the banking licence*".

55. Page 3 also states that the AFSA "*have identified that the Board of Directors and the Supervisory Board of the Bank are the same body according to Russian Federation law"* and that it had "*received an e-mail confirmation from Mr Carmi's contact person that these bodies are the same*". *That means that Mr Carmi continued to hold his position on the Board of Directors, despite claiming to have resigned from it*". The Notice states that Russian Federation Law stipulates that the Board of Directors has a range of competencies. These, it is stated, include determining the priority areas of the company's activities; convening annual and extraordinary General Meetings of shareholders; approving the agenda of General Meetings; appointing and dismissing the executive body of the company if authorised by the company's charter; and defining principles and approaches for organising risk management, internal control, and internal auditing. Page 4 of the Notice refers to the Ruling of the Supreme Court of the Russian Federation *No. 305-ЭС21-16982* dated 23 September 2021. It states that "*the Court determined that Mr Carmi was serving as the Chairman of the Board of Directors of the Bank, which made him the Head of the executive body of the Bank, when the CBR revoked the banking license*".

56. The AFSA concluded that:

> *"Based on the information mentioned above, we believe that Mr Carmi has not provided sufficient evidence to substantiate his claim regarding limited powers during his tenure as Chairman of the Bank's Supervisory Board, which in turn undermines the fitness and propriety of Mr Carmi. Furthermore, providing misleading information in the application reflects dishonesty and a lack of transparency in relation to the regulator. Consequently, the AFSA has determined that Mr Carmi's ability to adhere to the principles of integrity and relations with the AFSA, as outlined in rules 4.2.1 and 4.2.11 of the AIFC General Rules, cannot be assured."*

57. ***(2) Misconduct:*** Page 4 of the Notice stated that, during the assessment, the AFSA "*observed plenty of adverse reviews about Mr Carmi*" and referred to the open source (the article in Kommersant referred to at [38] above) which stated that Russobank had received a notice from the CBR about identified violations and what it alleged were Mr Carmi's attempts to manage the situation, including that he arranged a meeting with Colonel Cherkalin. It also set out Mr Carmi's response to the AFSA which I have summarised at [40] above and therefore do not do so again. At page 5 of the Notice, it is stated that "*considering the information above, the AFSA believes that Mr Carmi's handling of regulatory issues with state authority officers raises questions about his integrity, honesty, and reputation before the AFSA*".

58. The AFSA's conclusions on page 5 state that "*given the facts and matters described above, the AFSA has determined that Mr Moriel Carmi has not demonstrated to the AFSA's satisfaction that he is a fit and proper person to be a Controller of an Authorised Firm*".

J THE GROUNDS OF APPEAL

59. Mr Carmi's factual case is set out in his claim form. He only addresses the grounds of appeal in Article 11(2) of the FSFR on which he relies in his Response to the AFSA's Defence, substantial extracts of which have been cut and pasted into his Response.

60. An important part of Mr Carmi's factual case set out in his claim form is that he sold his shares in Russobank in 2010 and thereafter had no shares and no direct managerial powers or and ability to exercise significant influence over its activities: Claim, page 3. This was *inter alia* because under the Federal Law of the Russian Federation on Banks and Banking Activity 1990 the position of Chairman of Russobank's Supervisory Board was an honorary one: Claim, page 2.

61. Secondly, he claims that during a routine inspection of Russobank in 2018 by the CBR, a member of a group of extortionists working *"under the guise of the FSB"* and with corrupt officials of the CBR, demanded payment of a bribe of €500,000 in exchange for not revoking Russobank's licence. When the bank refused to pay, its licence was revoked: Claim, page 2. Mr Carmi's claim form refers to the article in the *Kommersant* newspaper about the arrest and indictment of Colonel Cherkalin discussed at [38], [40] and [57] above and the allegation that Mr Carmi was willing to

pay a bribe, an allegation which it stated he "*categorically denies"* but was "*echoed by other Russian news channels*": Claim, pages 3-4.

62. Mr Carmi also submitted that the reasons given by the CBR for revoking Russobank's licence were not, as stated in the Order, "*repeated violation"* of the Russian legislation dealing with money-laundering and the financing of terrorism, but purposeful persecution of Russobank by what he described as "*the ultra-right nationalist media*": Claim, page 3. At page 4 of his claim, he states that he is "*still experiencing serious consequences from the decision to confront corruption in the person of Cherkalin"* and that he *"was harassed not only for refusing to pay a bribe, but also because [he is] Jewish, like some employees in the bank".*

63. Mr Carmi's grounds of appeal are essentially as follows. First, that the decision is unreasonable within Article 11(2) of the FSFR and violates the general principles of law. Paragraph 4 of his Response to the AFSA's Defence (hereafter "Response") states that the decision was made "*without a thorough analysis, without taking into account the real state of affairs and my arguments, without taking into account objective arguments, but guided solely by prejudices and a subjective assessment of my person, which led to the adoption of an unreasonable decision that violates the general principles of law, as well as the norms of applicable law".*

64. Secondly, he argues in §11 of his Response that the AFSA did not provide any evidence that his judgment that he had no direct managerial powers over Russobank was incorrect. He states that the decision of the Supreme Court of the Russian Federation *No. 305-ЭС21-16982* dated 23 September 2021 in which it was stated that he "*was allegedly the head of the bank" i*s not true because the "*the Law on Banks and Banking Activities expressly prohibits a member of the Supervisory Board from managing a bank, therefore the provisions of the law must be followed".* He stated that he had provided a copy of Russobank's Regulations on the Board of Directors and other documents but needed more time to prepare and submit an opinion on the legal status of the chairman of the Board of Directors (Supervisory Board) of a bank in general and in particular on his own status. §13 of his Response stated that the reason the full PWC Report which the Claim form maintained provided "*independent confirmation of the transparency and legality of the origin of my funds and property*" had not been provided was "*due to the confidentiality regime established in relation to this expert opinion*". Mr Carmi said that he would prepare a different opinion for the trial, and he has since filed Mr Zalmanov's legal opinion.

65. Thirdly, in §12 of his Response Mr Carmi states that he provided media publications and other arguments "*that proved that the regulatory proceedings in Russia were not genuine but were an attempt to commit extortion by the Russian FSB (Federal Security Service) in concert with officials of the CBR*", and that "*members of the FSB were later caught 'red-handed and arrested'*".

66. Mr Carmi's fourth submission on his position is that the information about him is in the public domain and "*It is quite obvious that such well-known supervisory authorities as FIU (Estonia) and FCA (Great Britain) have similar information about me, moreover, it was also provided upon receipt of the relevant licences and company registration*": see Response, §14.

67. In the section of his Response dealing with his reliability, Mr Carmi states that he is a trustworthy and conscientious person, and a fit and proper person to be a controller of an authorised firm pursuant to the Financial Technology Rules and the principles in Rules 4.2.1 and 4.2.11 of the AIFC General Rules and sets out the reasons which he maintains confirms that this is so.

68. He states (at §§16 and 21-23) that he disclosed all the requested personal information about himself, including his participation in various companies and projects, information about his personal life, financial status and all other information as part of the procedure when applying for a licence. He submits that he complied with §§5.16(g),(h) and (j) of the Regulatory Guidance in relation to Russobank. He was not required to disclose any information about the revocation of the Bank's licence because he didn't exert any influence or play a role in those events and was not a beneficiary or a shareholder in the Bank when its licence was revoked. He was then only "*indirectly de jure Chairman of the Supervisory Board of Russobank"* and played only "*a formal role"* in accordance with the express prohibition in the Law on Banks and Banking activity on a member of the supervisory board from managing a bank.

69. Paragraph 18 of Mr Carmi's Response states that his answers to the "*Fit and Proper Questionnaire*" in the FinTech Lab Application were correct because he has never been censured, disciplined, publicly criticised, or the subject of any investigation or inquiry by any regulatory authority, financial services regulator, or officially appointed inquiry, or made aware either formally or informally that he was the subject of current or pending investigation.

70. The essence of Mr Carmi's submissions in support of his appeal are thus that the AIFC (i) did not use objective methods of finding and using information in particular in relation to his position at

Russobank, the revocation of its licence by the CBR and the reasons for that revocation, (ii) proceeded on the basis of an error as to the status of the Supervisory Board of Directors under Russian law, (iii) did not thoroughly study information about him and his participation and non-participation on the boards of various companies, and (iv) did not take into account the experiences of his successful projects and his obtaining licences from financial regulators in other jurisdictions.

K THE EXPERTS' REPORTS

71. The Preamble to Mr Zalmanov's legal opinion on the legal status of the chairman of the Board of Directors (Supervisory Board) of a Bank in the Russian Federation states that he is Chairman of the Moscow Bar Association "Interterritorial", an Honoured Lawyer of the Russian Federation, has been repeatedly elected to the Presidium of the Federal Bar Chamber of Russia, the author of many scientific publications, and has had legal experience in the field of civil law since 1973.

72. The opinion contains 9 sections: 1 A review of legal regulation in the field of corporate governance and control in a joint-stock company; 2 The role of the Central Bank of Russia ("CBR") in regulating corporate relations and ensuring control in the corporate sphere, with the peculiarities of the legal status of credit institutions; 3 Board of directors of a joint stock company (general legal regulation); 4 Features of the competence and organisation of activities of the board of directors (supervisory board) of a credit organisation (special legal regulation); 5 The competence of the board of directors (supervisory board) of a joint stock company and the legality of decisions made by it; 6 The legal nature of the relationship between the joint stock company and the board of directors (supervisory board); 7 Chairman of the Board of Directors in the Joint Stock Company; 8 Responsibility of members of the board of directors of the bank and, 9 grounds for releasing controlling persons from subsidiary liability.

73. The opinion refers to Article 16 of the Law on Banks and Banking Activities in section 4 of the opinion which is concerned with the competence and organisation of the supervisory board. It is stated that:

> *"A person performing the functions of a member of the board of directors (supervisory board) of a credit organization and a candidate for the specified position must meet the requirements for business*

> *reputation established by paragraph 1 of part one of Article 16 of this Federal Law, as well as the qualification requirements established in accordance with federal laws*.": Opinion, page 18, page 146 of the bundle.

It is then stated that if a member of the supervisory board is convicted of committing an intentional crime or there is a court decision holding a member of the supervisory board vicariously liable for the organisation's obligations, or an administrative penalty disqualifies the member, the member is considered to have resigned from the supervisory board. It concludes that the competence of the supervisory board is "*three-level*"; first determined by the organisation's charter, secondly, determined by Article 65 of the Law on Joint-Stock Companies, and thirdly, by the issues specifically identified in Article 11.1-1 of the Law on Banks and Banking Activities. He does not, however, cite Article 11.1-1.

74. At page 48 of the Opinion, page 176 of the bundle, Mr Zalmanov noted that the revocation of Russobank's licence did not lead to its bankruptcy because it had sufficient funds to fulfil all its obligations and "*the termination of the bank's activities was carried out through a liquidation procedure controlled by the Central Bank.*" Mr Zalmanov's overall conclusion is that:

> *"An analysis of the Charter and Regulations on the Board of Directors of Russobank allows us to conclude that the specified body did not belong to the management bodies of the bank and Moriel Carmi when performing the functions of a member of the Board of Directors of JSC JSCB RUSSOBANK, that is, a collegial management body, and as chairman, did not have the right to act on behalf of JSC JSCB RUSSOBANK externally in the process of carrying out business activities, which means that it does not have any signs of a person controlling the bank and, as a result, there is no responsibility for the bank's failure to comply with anti-money laundering procedures and responsibility for the consequences of decisions made by the bank's executive bodies that led to the revocation of the banking license."*
>
> *"This conclusion is also confirmed by an analysis of judicial practice in the dispute between Moriel Carmi and the Central Bank of the*

Russian Federation on the issue of protecting business reputation related to the publication by the Central Bank of the Russian Federation of a press release on the revocation of the banking license of JSC JSCB RUSSOBANK. Thus, in particular, the following expression was used in the press release: "a number of circumstances indicated the purposeful involvement of the credit institution in conducting dubious transactions and the absence of its management's intentions to take effective measures aimed at stopping such activities." Meanwhile, the courts indicated that in this case, the description given by the Central Bank of the activities of the management of JSCB RUSSOBANK cannot relate to the personality of Mark Weinstein, since he "while performing the functions of a member of the Board of Directors, that is, a collegial management body, did not have the right to act on behalf of JSC JSCB "RUSSOBANK" externally in the process of carrying out business activities. In connection with this, his argument about the inextricable connection of his business reputation with the reputation of the bank is exclusively presumptive, subjective in nature, and has no legal (regulatory) confirmation." (Resolution of the Ninth Arbitration Court of Appeal No. 09AP-32450/2022 in case No. A40-286513/2021)": pages 48-49 (pages 176-177 of the Bundle)

75. Mr Khorovskiy sets out his qualifications and experience in section 1 of his expert report. That states that he is a practicing Russian lawyer with 28 years' experience in banking and finance including banking regulatory matters. As well as his Russian qualifications, he has an LLM in Banking and Finance Law from University College, London. He is the managing partner of GRATA LLC, the Moscow office of the law firm GRATA International, and was previously a Partner and head of DLA Piper's finance and projects practice in Russia and the CIS, and a consultant in the banking department of Allen & Overy.

76. Mr Khorovskiy was asked to address two questions and to comment on Mr Zalmanov's legal opinion. Section 7 of his report refers to four decisions of the Moscow Arbitrazh Court and one of the Nineth Arbitrazh Court of Appeal dismissing claims against Mr Carmi brought against the

Central Bank of Russia to protect his business reputation.[4] The two questions he was asked to address are:

(1) whether under the Law on Banks and Banking Activities Mr Carmi was prohibited from serving on the Board of Directors of an entity to which business reputation requirements and/or from owning more than 10% of the share capital of a financial organisation because he was the Chairman of the Board of Directors (Supervisory Board) of Russobank in the 12 months preceding the revocation of its licence and appointment of the temporary administration at the Bank, and

(2) Are the responsibilities and role of the Chairman of the Board of Directors and Chairman of the Supervisory Board of a bank in Russia the same?

77. On the first question, Mr Khorovskiy summarised Articles 11.1 and 16.1 of the Law on Banks and Banking Activities 1990 as amended and Cassation ruling of the Administrative Division of the Supreme Court of the Russian Federation No. 5-KA Дд23-5-K2 dated 5 July 2023. Article 11.1 provides that a candidate for appointment to the Board of Directors (Supervisory Board) of a credit institution must comply with certain business reputation requirements and Mr Khorovskiy stated that the Cassation ruling is indicative of how those requirements are interpreted by Russian Courts.

78. At §4.2 of his report, Mr Khorovskiy states that Article 16(1) *"establishes that a candidate to a Board of Directors (Supervisory Board) of [such an institution] will not be considered as complying with the business reputation requirements if, in particular, the candidate has acted as a member of the Board of Directors (Supervisory Board) of a credit institution within 12 months preceding the date of revocation of a licence from a credit institution due to violation of Russian law or the commencement of a temporary administration of credit institution*". At §4.3 he states that *"these provisions for automatic disqualification operate for 10 years from the date of revocation of a licence, unless the candidate has satisfied the Bank of Russia by evidence of his/ her non-participation in the decision making, acts or omissions which caused the licence revocation and appointment of the temporary administration".* He stated that there is a database of individuals who are automatically disqualified. The Cassation ruling is dealt with at §4.7 of the report. It is

[4] Mr Carmi, however, succeeded in his claims against the newspaper, "Zavtra" which was the CBR's co-defendant, and against an internet site, https://rucriminal.info.

there stated that one of the principles enunciated in the ruling is that the burden of proof in showing that the business reputation of a member of the Board of a credit institution is compliant with Article 16 and that he or she was not involved in any decision-making that caused the revocation of the credit institution's licence lay on that member. Mr Khorovskiy states that "*it is the responsibility of the member of the Board … or other relevant official of the Bank to prove his or her compliance to the Bank of Russia {CBR] or in court".*

79. After summarising the factual circumstances concerning the revocation of Russobank's licence and Mr Carmi's position in the Bank at that time, Mr Khorovskiy's conclusion is that Mr Carmi is prohibited from being a member of the Board of a credit institution in Russia and from holding more than 10% of its shares for 10 years from the date of the revocation of Russobank's licence, i.e. December 2028.

80. On the second question, Mr Khorovskiy referred to Articles 65 and 67 of the Law on Joint-Stock Companies 1995 and Article 11.1-1 of the Law on Banks and Banking Activities setting out the functions of the Chairman of the Board of Directors (Supervisory Board) and the competencies of the Board. At §§5.4 – 5.5, he stated that Article 11.1-1 provides that the competency of the Supervisory Board of a credit institution is determined by the Law on Joint-Stock Companies and summarised Article 65 of that law and the additional duties imposed on the Supervisory Board of a credit institution by Article 11.1-1. His conclusion at §§5.6 and 5.7 is that the Supervisory Board of a credit institution has the same authorities as the Supervisory Board of an ordinary joint-stock company, but additionally has the additional authorities set out in Article 11.1-1 He stated that, although he had not seen the Charter of Russobank, Mr Carmi's statement that "*the Chairman of the Board of Directors held an honorary position at Russobank that did not provide for a direct management of the credit institution does not appear consistent with the role of a Board of Directors of a credit institution and its chairman under Russian law*".

81. Mr Khorovskiy commented that Mr Zalmanov's legal opinion mainly describes general provisions of Russian law on joint-stock companies and the role of the Central Bank of Russia in regulating and controlling the activities of credit institutions. In relation to the business reputation requirements in Article 16, at §6.2 he stated that Mr Zalmanov's opinion is not complete because it does not describe the effect of non-compliance with those requirements. At §6.3, in relation to the passage from Mr Zalmanov's opinion set out at [74] above, he observes that "*the fact that*

[Mr Carmi] is not a person controlling the bank does not exclude application of the restrictive provisions of Article 16(1) … to [him] as a member of the Board of Directors of Russobank".

82. I stated at [6] above that Mr Carmi objected to the admission of Mr Khorovskiy's Report. He did so on several grounds. He argued that the report did not comply with Article 2(2)(1) of the Russian Federation's Advocacy Law 2002, and Article 9(3)(1) of the 2003 First Russian National College of Advocates' Professional Ethics Code. Essentially, he maintains that these prohibit a Russian lawyer from providing legal services outside the scope of legal practise except for dispute resolution activities, and that Mr Khorovskiy did not confine himself to opining on the legal issues of interpretation and application of Russian law relating to the status of the Chairman of the Board of Directors (Supervisory Board) of a bank in the Russian Federation. Mr Carmi also submitted that it is clear from the text of the report that it contains "*gross errors in quoting legal norms*" and he criticised its treatment of decisions of the Russian courts. He submitted that the Report is not an independent scientific opinion but one which improperly cites sources of law, gives its own subjective interpretation of judicial acts and the merits of the dispute, and was not even drawn up by Mr Khorovskiy himself but by employees from GRATA LLC.

83. I will deal with Mr Carmi's criticisms of Mr Khorovskiy's treatment of Russian legislation and court decisions to the extent that Russian law is relevant to this appeal in the next section of this judgment. But I reject his objections to the admission of the report. What qualifies as expert evidence in the AIFC Court is governed by AIFC law. The Court's power to admit expert evidence in Article 27.2(c) of the AIFC Court Regulations is broad: to admit such evidence "*on such terms and in such form as it considers appropriate*". It is standard practice in leading jurisdictions for the parties in a case where foreign law is relevant to the determination of an issue to provide the court with a report by a suitably qualified foreign lawyer experienced in the relevant area of law. Absent misconduct by a report writer, it is inconceivable that in a case in which points of foreign law arise, a party to proceedings in the AIFC Court should not be allowed to adduce expert evidence of that law in response to expert evidence adduced by the other party. There is no such misconduct here. Mr Khorovskiy has 28 years' experience in banking law and regulatory matters. He stated in Part 8 of his report that he has complied with his "*overriding duty to the Court*" in Part 19 of the AIFC Court Rules and has no conflict of interest in providing it. He stated at §2.11 that he was assisted by colleagues who conducted research under his instructions, that he reviewed their work to form his own opinion, and that the opinions expressed in the Report are his. To the extent that Russian Law is relevant, it, moreover, appears from the decisions of the

Council of the Russian Federal Bar Association, the Plenum of the Supreme Court and Presidium of the Higher Arbitrazh Court referred to in §§ 2.6 and 2.7 of Mr Khorovskiy's Second Report that a Russian advocate is permitted to prepare an expert report on Russian law at the request of a foreign court.

L DISCUSSION

84. The AFSA's regulatory regime, the factual case on which Mr Carmi relies in this appeal, and my understanding of the grounds of appeal that he has set out in his response to the AFSA's defence and subsequent communications are respectively summarised at [15] – [23] and [59] – [70] above.

85. At the core of Mr Carmi's case is that he sold his shares in Russobank in 2010 and that, since then, his sole position in the bank was as Chairman of its Supervisory Board of Directors which he submitted was an honorary position. He written submissions maintain that this meant that when, in 2019, the CBR revoked Russobank's licences, he had no direct managerial powers in the bank and was unable to exercise significant influence over its activities. He argued that Mr Zalmanov's expert opinion shows that the AFSA's rejection of his application was based on an error by it as to the status of the Supervisory Board of Directors under Russian law. He maintained (see § 11 of his Response to the AFSA's Defence) that the AFSA did not provide any evidence in support of its view that he had direct managerial powers in the bank and that the decision of the Supreme Court of the Russian Federation No. 305-ЭС21-16982 dated 23 September 2021 which I have referred to at §§ [45], [55] and [64] above was "*not true*". This, he argued, was because "*the Law on Banks and Banking Activities expressly prohibits a member of the Supervisory Board from managing a bank*" and, in accordance with that, he played only "*a formal role*" and was only "*indirectly de jure Chairman*" of its Supervisory Board.

86. Although only inferentially, Mr Carmi in effect argued that, having divested himself of his shares and having no direct managerial powers in the bank, and only an honorary position in it, he was not required to disclose in his application to the AFSA the matters concerning Russobank and the other matters not disclosed on which the AFSA relied in its decision: see [68] – [69] above.

87. Mr Carmi also submitted that the AFSA had acted unreasonably in not analysing the real state of affairs in relation to Russobank. He maintained that the CBR's reasons for revoking the bank's

licence were not in reality repeated violation of Russian money laundering and terrorist financing legislation, but the persecution of the bank and of him for refusing to pay a bribe, and because he, like some other bank employees, is Jewish. As I have stated, see [69] above, Mr Carmi also submitted that his answers in the application form were correct because he has never been censured, disciplined, or publicly criticised by any regulatory authority or made aware that he was the subject of an investigation.

88. These submissions must be assessed in the light of the relevant regulatory rules and guidance, and the information required to be given in the application forms completed by Mr Carmi. The pre-application and application forms state that "*it is important that you provide accurate and complete information and disclose all relevant information*". They also state that failure to do so "*will call into question the applicant firm's suitability to be authorised"* and may amount to acting in a deceptive or misleading manner contrary to FSFR, Article 119(e).

89. The regulatory rules (summarised in section E of this judgment) provide guidance as to what information an applicant should provide in its application. For present purposes it suffices to state that Core Principles 1 and 11 of the AIFC General Rules require Authorised Persons to observe high standards of integrity, to deal with the AFSA in an open and co-operative manner, and to keep the AFSA "*promptly informed of recent events or anything else relating to the Authorised Person of which the AFSA would reasonably expect to be notified*". §§5.9 and 5.10 of the AIFC's Regulatory Guidance (see [22] above) reflect these core principles in the context of applications. § 5.9 states that in making an assessment "*the burden is on the applicant sponsoring the application to satisfy the AFSA that the person is fit and proper to perform the function"* and §5.10 that "*applicants and persons are expected to provide complete and truthful information*". The importance of such disclosure and the fact that the failure to disclose can amount to acting without integrity is seen from the decision of the UK's Upper Tribunal's Tax and Chancery Chamber in *Page* discussed at [24] – [25] above. Their importance is also seen because the dangers of impropriety, money-laundering and fraud involving cryptocurrency are well known, as exemplified by the recent trial in which convictions were obtained in respect of a fraud against customers of the now bankrupt FTX cryptocurrency exchange.

90. I first deal with Mr Carmi's submission that the AFSA's decision was unreasonable because it was made without taking account of objective arguments and a proper analysis of the real state of affairs but was guided solely by prejudices and a subjective assessment of him.

91. The AFSA's assessment of Mr Carmi's fitness and propriety to hold a licence to operate in its FinTech lab was based on information discovered during its internal investigation which had not been disclosed in Mr Carmi's application which it put to him, and on his responses. I note that as well as its preliminary risk analysis in December 2022, the AFSA wrote to Mr Carmi on 9 March 2023 about his shareholding in Russobank and position in SIA New Solutions, and on 27 March 2023 for further information within 15 working days about Russobank and the allegations in the article in Kommersant. I also note that his application did not state that he had changed his name or that he was or had been a Russian citizen although these were matters of which the AFSA could reasonably expect notice in order to conduct its regulatory checks. Not having that information made it harder for the AFSA to investigate Mr Carmi's former activities. It was only in Mr Carmi's letter dated 15 March 2023, some three months after his application, that he gave information about his change of name, and only in his (apparently out of time) response dated 2 May 2023 to the AFSA's request dated 27 March 2023 for further information did he give information about the sales of his shares, the register of shareholders and his comments on the Kommersant article and its allegations concerning Colonel Cherkalin.

92. Another aspect of the AFSA's investigation into Mr Carmi's application was that in April 2023 it had requested further information from the CBR about Mr Carmi's role in Russobank's management structure. The CBR's reply, dated 4 May 2023, stated that Mr Carmi had been Chairman of the Board of Directors of Russobank during the 12 months preceding the CBR's revocation of its licence and was barred from being on the Board or holding more than 10% of the shares of a Russian credit institution for 10 years and a non-credit financial institution for 5 years: see [41] above. I have observed that the CBR's reply may not have reached Mr Mukhambekov before he submitted his report dated 10 May 2023 recommending that the AFSA Committee on Authorisation reject Mr Carmi's application and thus it may not have been taken into account in the Committee's decision. But see [45] above, Mr Mukhambekov's report does refer to the decision of the Supreme Court dated 23 September 2021 which determined that "*at the time of licence revocation Vainstein MM [i.e. Mr Carmi] was the Chairman of the Board of Directors of the bank – the head of its executive body of the legal entity*" and not, as §11 of Mr Carmi's Response stated that he was "*allegedly*" the head of the bank.

93. Mr Carmi's submission (see [64] above), that the AFSA did not provide evidence that he had managerial powers in Russobank at the time that its licence was revoked is misconceived for two

reasons. First, the decision of the Supreme Court dated 23 September 2021, in Mr Carmi's Cassation appeal, constitutes such evidence. Secondly, § 5.9 of the Regulatory Guidance makes it clear that the burden of satisfying the AFSA that a person is "fit and proper", including that he had no managerial powers in a Bank that had its licence revoked, lies on the authorised person or applicant sponsoring the application. Mr Carmi simply asserted that the decision was "not true" because of the express provisions of the Law on Banks and Banking Activities. But until the decision of a court with jurisdiction over a matter is overruled by a subsequent decision or legislation, it is valid even if it is incorrect. Mr Carmi relies on assertions by him and a press account suggesting anti-semitism. It may be that underlying Mr Carmi's position is a submission that the judicial process was subverted in that case. But he has brought no material to show this.

94. Moreover, the media material Mr Carmi relied on in support of his submission (see [65] above) that the reasons for the CBR revoking Russobank's licences were not violations of money-laundering and terrorism legislation but purposeful persecution by ultra-right nationalist media and because he and others involved in the bank are Jewish do not show that those were the purposes of the CBR itself or that it took such considerations into account. Accordingly, the suggestion that the regulatory and the judicial processes were subverted have not been established. The AFSA, a regulatory body in Kazakhstan, was entitled to take the decisions of the CBR and the Russian Supreme Court into account in determining Mr Carmi's position in Russobank at the time its licence was revoked and the consequences for him of that revocation.

95. Finally, in relation to his submission that the information about him is in the public domain but the financial regulatory authorities in the United Kingdom and Estonia have granted him licences, again, § 5.9 of the Regulatory Guidance is relevant. Mr Carmi has not provided the AFSA or this court with evidence that the FCA and the FIU were aware of the revocation of Russobank's licence, Mr Carmi's change of name, or the allegations of involvement with officials who sought corrupt payments either when they authorised him or subsequently.

96. For these reasons, I reject the submission that the AFSA's decision was made without taking account of objective arguments and a proper analysis of the real state of affairs. Determining Mr Carmi's application as the controller of Banxe Asia Ltd. undoubtedly involved questions of judgment. I accept the submission on behalf of the AFSA that, in exercising that judgment, it undertook a careful analysis of his fitness and propriety, put its points of concern to him and

received his responses, which were put before the Committee that made the decision on his application.

97. I turn to whether Mr Carmi failed to give an accurate or complete account of the information relevant to his application. I have referred at [91] above to his failure to state in his application that he had changed his name or that he was or had been a Russian citizen or his contacts with Colonel Cherkalin during the CBR's investigation into Russobank. I also observe (see [28] above) that in his applications, he describes his country of origin as Israel rather than Russia or the USSR. I now consider his argument that he was not required to disclose that Russobank had lost its banking licences and the other undisclosed matters relating to Russobank relied on by the AFSA and his submission that the AFSA's decision rejecting his application was based on an error as to the status of the Supervisory Board of Directors under Russian law.

98. Whether or not Mr Carmi's arguments about the responsibility of Bank Directors and members of Supervisory Boards under Russian law are correct, Mr Carmi's failure to disclose the position and explain his understanding of it was a serious failure by him to deal with the AFSA in an open and co-operative way. It is clear from Core Principle 11 of the AIFC General Rules and the UK case of *Page v Financial Conduct Authority* [2022] UKUT 124 discussed at [24] – [25] above a failure to disclose any information of which the AFSA would reasonably expect notice may amount to acting without integrity. § 5.16(g) of the Regulatory Guidance (set out at [23] above) states that the matters the AFSA will consider in relation to integrity and reputation are whether the applicant has been "involved" with an organisation which has had its licence to carry out a business or profession revoked. It is unarguable that Mr Carmi, as chair of Russobank's supervisory board when the bank's licence was revoked, was clearly "involved" with the bank, even if he did not control it or have managerial powers or significant influence over its activities.

99. It is therefore not necessary to determine the precise position under Russian law. However, as I observed at [93] above, the AFSA was entitled to take into account the decision of the Supreme Court dated 23 September 2021 referred to at [45] and [55] above. The position has now been confirmed by the CBR in its reply to the AFSA dated 4 May 2023 which (see [41] above) stated that Mr Carmi is barred from being on the Board of a Russian credit institution or holding more than 10% of its shares for 10 years from 2018.

100. If guidance is to be obtained from the experts' reports, I observe that Mr Khorovskiy's is more structured and focussed on the issues before this Court than Mr Zalamnov's. Mr Zalamnov hardly

deals with Article 16 of the Law on Banks and Banking and does not address the consequences of a person's non-compliance with its business reputation requirements. Nor does he consider the decision of the Supreme Court dated 23 September 2021. Those matters, as well as the fact that the version of the Law on Banks and Banking filed by or on behalf of Mr Carmi was the out-of-date 2008 text which does not set out those consequences and the periods of sanction in the way that the up-to-date version does, meant that an incomplete picture was given to the court. As to the reference by Mr Zalmanov to the decision of the Ninth Arbitration Court of Appeal, which is set out at [74] above there is considerable force in Mr Khorovskiy's observation set out at [81] above that the fact that [Mr Carmi] did not control the bank at the material time *"does not exclude application of the restrictive provisions of Article 16(1) … to [him] as a member of the Board of Directors*".

101. What of Mr Carmi's criticisms of Mr Khorovskiy's treatment of Russian legislation and the decisions of the Russian courts? In relation to legislation, I observe only that I do not consider that the submission that the Report cites Article 16(1) of the Federal Law on Banks and Banking Activity "*not as published by the authority and as stated in the Banking Law*" undermines Mr Khorovskiy's conclusion. Mr Carmi's primary example of this is that the Report relies on provisions for automatic disqualification which he states are not to be found in that law, and without stating the exceptions to the grounds for refusal to register and issue a licence to a credit organisation. He argues that contrary to the opening words of §4.3 of Mr Khorovskiy's Report, disqualification is not automatic because it is open to the Board member or other person who must comply with certain business reputation requirements to satisfy the CBR with evidence of non-participation in decisions of the credit institution that had had its licence revoked. That argument may have some semantic force, but, reading the sentence as a whole, it is clear that the Report is stating that disqualification will follow *unless* the person has satisfied the CBR "*by evidence".* It is thus setting out a default position and, reflecting § 5.9 of the Regulatory Guidance, putting the burden on the person who must comply with the business reputation requirements and does not give a misleading impression.

102. Mr Carmi's assertion that Mr Khorovskiy's treatment of decisions of the Russian courts ignored the conclusion of the Ninth Arbitration Court of Appeal in case A40-286513/2021 referred to by Mr Zalamnov in the part of his opinion set out at [74] above is simply incorrect. Mr Khorovskiy commented on what Mr Zalmanov stated about that decision and his comment is set out at [81] above. I reject the submission that Mr Khorovskiy's report contains "*gross errors in quoting legal*

norms". Its summaries of the key legislative provisions relied on, and of the decisions of the courts are based on their actual language. Its conclusions are consistent with the decision of the Supreme Court dated 23 September 2021 and the position of the CBR set out in its reply to the AFSA dated 4 May 2023, on which see [41] and [99] above.

103. Accordingly, Mr Carmi's answers to the "Fit and Proper Questionnaire" in the FinTech application form were, as Mr Jaffey submitted, "*at best", "misleading by omission*": see written submissions, §19. The proactive disclosure of relevant information of which the AFSA would reasonably expect notice by individuals and companies is an important component of the requirements of integrity, and openness and co-operation in Core Principals 1 and 11 of the AIFC General Rules. In assessing fitness and propriety for a licence, the AFSA is also required to consider whether any matter may harm or may have harmed its integrity or reputation or the integrity or reputation of the AIFC: AIFC General Rules, Rule 1.1.5(c), (d), and (i), summarised at [20] above.

104. I accept Mr Jaffey's submission at §29 of his written submissions that the most important matter not disclosed by Mr Carmi was that he was prohibited under Russian law from acting as a director or owning a substantial shareholding in a Bank because he had served on Russobank's Board of Directors (Supervisory Board) during the 12 months prior to the CBR's revocation of its licence. Mr Carmi had litigated about the decision in Russia, failed to overturn the decision, but then concealed it from the AFSA. The AFSA was entitled to view this as a serious matter which went directly to his fitness and propriety. As stated in the final paragraph of the section on "failure to demonstrate integrity" in the reasons for its decision set out at [56] above, the AFSA was entitled to conclude that Mr Carmi's ability to adhere to the principles of integrity in his relationship with the AFSA cannot be assured. It was also entitled to conclude that his handling of regulatory issues with state officials raises questions about his integrity and that he had not demonstrated that he was a fit and proper person to be the Controller of an authorised Firm.

M CONCLUSION AND ORDER

105. For the reasons given in section L of this judgment, I hereby order that the appeal by Mr Moriel Carmi pursuant to section 11(1) of the AIFC Financial Services Framework Regulations No 18 of 2017 against the decision of the Astana Financial Services Authority dated 23 May 2023 to reject his application for a licence to operate a crypto currency trading and custody facility in the FinTech Lab in the Astana International Financial Centre is dismissed.

By Order of the Court,

The Rt. Hon. Sir Jack Beatson FBA

Justice, AIFC Court

Representation:

The Claimant/Appellant was represented by himself.

The Defendant/Respondent was represented by Mr Ben Jaffey KC and Mr Ishaq Burney, the AFSA's Chief Legal Officer.

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 January 2024
CASE No: AIFC-C/CFI/2023/0008

MS. DILYA KHALIULINA

Claimant

v

(1) MR. AYAN KUCHUKOV
(2) MR. ADIL ALPYSBAYEV
(3) MR. BAURZHAN SARSENOV
(4) MR. NURTAS SAUTBAYEV

Defendants

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink KC

Court

ORDER

Upon hearing both Mr. Yerlan Mukhanbediyev, legal representative for the Claimant ("C"), and C herself, none of the First, Second, Third or Fourth Defendants ("D1", "D2", "D3" and "D4" respectively, the "Ds" collectively) attending in person or by legal representative at the Directions Hearing on 21 July 2023, it is ORDERED THAT:

1. Each of the Ds was served by the C (through her lawyers) with the Claim Form in a form or manner sufficient to comply with AIFC Court Rules Part 5 in or about January, February or July 2023 and in addition received notice thereof from the Court in February 2023.
2. The document entitled "REVIEW of the statement of claim" and dated 17 July 2023, filed with the Court by D2, will stand as both an Acknowledgement of Service and a Defence in response to the Claim Form for the purposes of AIFC Court Rules Part 9 and Part 14.
3. Each of the Ds was served by the Court on 18 August 2023 with notice of C's application dated 18 August 2023 for relief including default judgment under AIFC Court Rules Part 9, alternatively service of such application on each D took place by email from the Court on 9 September 2023.
4. There will be default judgment against D1, D3 and D4 for US$288 332 including costs pursuant to AIFC Court Rules Part 9, such sum to be paid within 7 days of this Order.
5. There will be immediate judgment against D2 for US$288 332 including costs pursuant to AIFC Court Rules Part 14 on the grounds that D1 has no realistic prospect of successfully defending the Claim, such sum to be paid within 7 days of this Order.

JUDGMENT

Introduction

1. By a claim (the "**Claim**") filed in Case Number AIFC-C/CFI/2023/008 by Claim Form dated 22 February 2023 (the "**Claim Form**"), the Claimant (C) seeks damages and costs from each of the Defendants ("D1", "D2", "D3" or "D4" respectively, collectively the "Ds") for breach of an oral contract which C alleges was entered into in 2021 between her and the Ds under which she agreed to provide the Ds with professional support and consulting services in relation to an application they wished to make to the Astana Financial Services Authority ("**AFSA**") for the registration or authorisation with the AIFC under special AFSA procedures of an entity in which C and each of the Ds from time to time held shareholdings.

2. These are my reasons for making the orders for default judgment (against D1, D3 and D4) and immediate judgment (against D2) set out above.

Service of Claim Form and notice of application and hearing.

3. I am satisfied on the evidence contained in the documents filed with the Claim Form and subsequently, including in C's Notice of Application dated 18 August 2023, as well as information provided to the Court at the hearing on 17 November 2023, that:

   (a) Each of the Ds received notice of the Claim, the Claim Form and, at least in general terms, the contents of the Claim Form. Such notice was provided to each of the Ds by the lawyers acting on behalf of C through a combination of:

      1. C's lawyers emailing copies of the Claim Form to email addresses for each of the Ds provided to her lawyers and the Court by C (and confirmed to be correct by C at the hearing on 17 November 2023 and, in the case of D1, D2 and D3 by comparison with the email address used by each of them in correspondence attached to the Claim Form and/or provided to the Court by C's lawyers ahead of the 17 November 2023 hearing); further, as to this:

         (i) further evidence of D1 receiving actual notice of the contents of the Claim Form (prior to the date of issue entered by the Court on its face, 26 February 2023) is provided by Annex 1 to C's application dated 18 August 2023 for, amongst other things, default judgment ("**C's 18 August 2023 application**"), which (as explained by C at the hearing on 17 November 2023) is a screenshot of WhatsApp exchanges between D1 and C on 26 January and 2 February 2023 in which D1 was raising with C the fact that he had received

the Claim Form by email (without the issue date on it) and in which he forwarded to C a copy of the Claim Form duly received by him;

(ii) further evidence of D2 receiving actual notice of the contents of the Claim Form is provided by the fact that on 19 July 2023, he filed with the Court a document entitled "REVIEW of the statement of claim" and dated 17 July 2023, which purported to be a response to the Claim Form (and noted expressly the sums claimed against him in the Claim Form).

2. On 4 July 2023, C's lawyers sending copies of the Claim Form and related correspondence to each of the Ds' addresses (as known to and provided to her lawyers by C). In each case these were returned. However:

(i) In the case of each of D1 and D2, it is established that they each had notice of the Claim Form and its contents in any event (see sub-paragraphs 3(a)1(i) and (ii) above);

(ii) In the case of D3, on 5 July 2023 he was spoken to by C's lawyers on the mobile number known to C and provided by her to her lawyers, informed about the delivery to (and return from) his address of the Claim Form (and what it related to), in response to which D3 stated that he would be at the address to which the Claim Form had first been sent in a month, but then sent a WhatsApp message on 12 July 2023 indicating that he would not accept the correspondence;

(iii) In the case of D4, on 5 July 2023 he was spoken to by C's lawyers on the mobile number known to C and provided by her to her lawyers, informed about the delivery to (and return from) his address of the Claim Form (and what it related to), in response to which D4 stated that he would pick up the correspondence from the offices of C's lawyers, but when called again on 10 July 2023 stated that he would not accept the correspondence.

(b) In all the circumstances, I am satisfied that the requirements of Rules 5.3 and/or 5.9 of the AIFC Court Rules have been met in this case such that service by C of the Claim Form took place on each of the Ds. Furthermore, each of the Ds was sent notice by email from the Court on 23 February 2023 that the Claim Form had been issued against each of them, sealed and given a case number (see paragraph 1 of C's Notice of Application dated 18 August 2023).

(c) Although not filed as a formal Acknowledgement of Service or Defence pursuant to Part 9 of the AIFC Court Rules ("**Part 9**"), I indicated at the directions hearing on 20 July 2023 that the Court would treat D1's "REVIEW of the statement of claim" document dated 17 July 2023 as both an Acknowledgement of Service and a Defence for the purposes of AIFC Court Rules Part 9 and 14 (and I so order above). Accordingly, no application for default judgment against D2 could succeed

and C would instead have to proceed by way of an application for immediate judgment under AIFC Court Rules Part 14.

(d) C's 18 August 2023 application against the Ds was served by the Court on the Ds on 18 August 2023, as confirmed in the email from the Court to the Ds dated 9 September 2023, which stands, in the alternative to 18 August 2023, as the alternative date for service on each of the Ds of C's 18 August 2023 application. Further notice of this application was provided to each of the Ds by email from C's lawyers dated 21 September 2023.

(e) Notice that there would be a hearing of C's 18 August 2023 application was provided to each of the Ds by the Court in the email from the Court to the Ds dated 9 September 2023. The date of the proposed hearing identified in that email was 29 September 2023. Subsequently, after that hearing date had been adjourned, the Ds were provided with notice of the hearing date of 17 November 2023 by email from the Court on 8 November 2023.

C's application for default judgment against D1, D3 and D4

4. As regards C's application for default judgment against D1, D3 and D4, this must succeed in the above circumstances combined with (a) there having been no Acknowledgement of Service or Defence filed by each of these Ds, (b) none of these Ds having filed any evidence in opposition to C's application for default judgment in response to paragraph 2 of the order made following the directions hearing on 20 July 2023 and (c) none of these Ds having attended the hearing on 17 November 2023 despite receiving notice thereof (see paragraph 3(e) above).

5. Accordingly, there will be default judgment under AIFC Court Rules Part 9 for the sums claimed in paragraph VIII of C's 18 August 2023 application, namely, under sub-paragraph 1, the sum of KZT 7,311,195 (or US$15,723 as at 23 December 2022), under sub-paragraph 2, damages of US$272,250 (or KZT 123,596,250 as at 23 December 2022) and, under sub-paragraph 3, costs of US$318 (or KZT 150,000 as at 7 October 2022), together with the additional costs incurred on or about 13 September 2023 of KZT 19,200 (or US$41 as at 13 September 2023) referred to (and supported by receipts) in the email to the Court and each of the Ds from C's lawyers dated 13 November 2023.

6. The total sum payable by each D under such default judgment is therefore US$288 332.

C's application for immediate judgment against D2

7. At the directions hearing on 20 July 2023, I indicated that, although the document filed with the Court by D2 entitled "REVIEW of the statement of claim" and dated 17 July 2023 did not purport to be a

formal Acknowledgement of Service or a Defence for the purposes of AIFC Court Rules Parts 9 and 14, I would treat it as such. Accordingly, I make the direction set out in paragraph 2 of the Order above. In addition, in paragraph 3 of the order made following the directions hearing on 20 July 2023 I directed that D2 should respond to any application made by C for immediate judgment against him within 28 days of service of any such application on him and that, as part of any such response by him, he should provide all evidence on which he wished to rely. No such response or evidence was filed by D2, nor did D2 attend the hearing on 17 November 2023

8. C's 18 August 2023 application purported, as a matter of form, to seek default judgment under AIFC Court Rules Part 9 against all four of the Ds (see paragraph VII of the Notice of Application), despite the fact that I had indicated that it would be necessary for her to make an application for immediate judgment against D2 under AIFC Court Rules Part 14 because he had filed his "REVIEW of the statement of claim" document which I intended to treat as an Acknowledgement of Service and Defence. However, it is clear that the intention underlying C's 18 August 2023 application was to make whatever application was, as a matter of substance, necessary as against each of the Ds. Further, it would have been clear to D2 from the order made following the directions hearing on 20 July 2023 that, in substance, the application he would be facing would be one for immediate judgment under AIFC Court Rules Part 14 and it was to such an application that he should direct any response or evidence he wished to file. Accordingly, I treat C's 18 August 2023 as such an application as a matter of substance, despite the form in which paragraph VII is couched.

9. I am satisfied that the requirements of Part 14 are met, in that D2 has no real prospect of successfully defending the Claim, for the following reasons:

   (a) The contract alleged to have been entered into by C with the Ds and breached by them (the "**Contract**") so as to entitle her to payment of a sum of money expended by her in performing the contract, damages for lost income due under the contract and costs, together with details of the breaches, is pleaded in detail in the Claim Form at paragraphs 6 to 22. In addition, C provided further information at the hearing on 17 November as to D2's involvement and liability under the Contract, in particular in relation to the meeting pleaded at paragraph 15 of the Claim Form, which took place in March 2022 (after the Contract had been entered into) at a time when D1, D3 and D4 had or were about to transfer to D2 their shareholdings in the entity whose registration with the AIFC under AFSA procedures C was assisting the Ds to procure through the services provided by her to the Ds under the Contract. These transfers would make D4 the sole or at least a majority shareholder in that entity. C informed me that, at this meeting, which she attended with all of the Ds, the Contract was affirmed and D4 accepted his liability to meet any claim C might have under the Contract, in exchange for C agreeing to transfer to her share in the

entity to D4. This is consistent with how the meeting is dealt with in paragraph 15 of the Claim Form.

(b) D2 has provided no response whatsoever either by way of pleading or evidence to the detailed allegations set out in the Claim Form in relation to the formation, terms and breaches of the Contract, or the losses suffered. All that he has done is to provide a bald denial of having entered into any agreement at all with C in his "REVIEW of the statement of claim", despite admitting that she played at least some role in the AIFC/AFSA registration project to which she says the Contract related and which he does not deny was a project in which he had an interest. This – together with the fact that he declined to respond to the direction made on 20 July 2023 to file any evidence on which he sought to rely and declined to attend the hearing on 17 November 2023 - is wholly inadequate to satisfy me that he has any realistic prospect of successfully defending the claim in the face of the detail set out in C's pleaded case, attested to by a statement of truth and corroborative documentation served with the Claim Form.

10. Accordingly, C is entitled to immediate judgment against D2 under AIFC Court Rules Part 14 in the same amounts as are identified in paragraphs 5 and 6 above, namely a total amount of US$288 332.

By the Court,

Justice Andrew Spink KC